

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

2006 DEC 20 P 1:12

GARY HORNE, AIS #180206,

Petitioner,

VS.

GWENDLYN MOSLEY, et al.,

Respondents.

DEBRA P. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

CIVIL ACTION NO.

1:06-CV-968-WK W

RESPONDENTS' ANSWER TO COURT'S ORDER TO SHOW CAUSE

Come now Respondents, by and through the Attorney General of the State of Alabama, and file their response to this Court's Order to Show Cause dated October 30, 2006, giving the Respondents until November 20, 2006 in which to file a response to the Petition for Writ of Habeas Corpus filed by the Petitioner, Gary Horne. In response, Respondents file the following answer, memorandum brief, and exhibits.

PROCEDURAL HISTORY

1. On March 3, 2004, the petitioner, Gary Horne, was indicted by the Dale County Grand Jury for attempted murder by shooting John Williams with a

handgun. State's Exhibit A (C. 34-35) On September 3, 2004, Horne moved to dismiss the charges against him, arguing that the State had lost evidence that was "crucial to the defense." State's Exhibit A (C. 95-97; RS2. 2)¹ Specifically, Horne argued that the State had lost a bullet which was "strongly believed" to have been shot from a gun allegedly sold by the victim, John Williams, shortly after the actions serving as the basis for the prosecution against Horne were committed. State's Exhibit A (C. 95; RS2. 2-12, 16) Horne also argued that photographs taken of the scene were unavailable. State's Exhibit A (C. 96; RS2. 13-15) Judge McLaughlin denied Horne's motion to dismiss on December 16, 2004. State's Exhibit A (C. 2)

Horne was tried before a jury, beginning on May 16, 2005. State's Exhibit A (R. 1-111) On May 18, 2005, the jury found Horne guilty of the lesser included offense of assault in the second degree. State's Exhibit A (C. 2) On July 14, 2005, Judge McLaughlin sentenced Horne according to the Habitual Felony Offender Act ("HFOA") based upon two prior felonies to twenty-two years' imprisonment. State's Exhibit A (C. 2; R. 123-124) At the sentencing hearing, Horne, through his attorney, objected to the State's alleged failure to give sufficient notice of the two prior felonies used to enhance his sentence. State's Exhibit A (R. 112-114) Judge

¹ References to the hearing on Horne's motion to dismiss, contained in the "Second Supplemental" record on appeal, are designated by "RS2".

McLauchlin ruled that the State had given sufficient notice of the two felonies. State's Exhibit A (R. 114) Horne filed a motion for new trial on July 28, 2005, which Judge McLauchlin denied after a hearing on August 19, 2005. State's Exhibit A (C. 8-9; R. 125-142)

2. Horne directly appealed his conviction, arguing:
 - (a) the State failed to produce potentially exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963);
 - (b) his sentence was illegally enhanced under the Habitual Felony Offender Act ("HFOA") because the State allegedly failed to provide proper notice of the prior felonies it intended to use for enhancement purposes.

State's Exhibit B.

3. The Alabama Court of Criminal Appeals affirmed Horne's conviction in an unpublished memorandum issued on August 11, 2006. State's Exhibit E.

The court found:

- (a) Under Arizona v. Youngblood, 488 U.S. 51 (1988), Horne was not entitled to any relief due to the State's inadvertent loss of evidence when the State did not seek to introduce such evidence in its case-in-chief;
- (b) Horne's argument that he did not receive proper notice under the HFOA was without merit because the record supported the trial court's conclusion that Horne received timely oral notice of the prior felonies used to enhance his sentence.

State's Exhibit E. The Court of Criminal Appeals overruled Horne's application for rehearing on September 1, 2006. State's Exhibits F and G. The Alabama Supreme Court denied Horne's petition for writ of certiorari and issued its certificate of judgment on December 9, 2005. State's Exhibit H and I. Horne has not filed any petitions for post-conviction relief in State court or any previous federal habeas petitions attacking the conviction at issue in this petition.

HORNE'S FEDERAL HABEAS CLAIMS

4. On October 25, 2006, Horne filed a writ of habeas corpus petition raising the following claims:

- (A) The State violated Brady v. Maryland, 373 U.S. 83 (1963), by withholding potentially exculpatory evidence; and
- (B) The Court of Criminal Appeals improperly found that he received oral notice of the prior felonies used to enhance his sentence under the HFOA because plea discussions may not be used as evidence in other criminal proceedings.

Petition, p. 5.

5. On October 30, 2006, this Court entered an order requiring Respondents to show cause why Horne's habeas corpus petition should not be granted, giving the Respondents until November 20, 2006 in which to respond.

6. On November 20, 2006, this Court granted the Respondents 21 days in which to file its response. After Horne filed a motion to amend his petition on November 29, 2006, this Court granted the Respondents until December 21, 2006 in which to respond to his petition as amended.

ANSWER TO THE PETITION

7. Horne's federal habeas corpus petition is timely under the one-year statute of limitation provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

8. Horne's federal habeas corpus petition is due to be denied because his claims are without merit.

9. Respondents deny Horne is in custody in violation of the laws or constitution of the United States. Horne's conviction and sentence were validly and constitutionally obtained.

MEMORANDUM BRIEF IN SUPPORT OF ANSWER

10. Horne's claim that the State violated Brady by withholding potentially exculpatory evidence is due to be denied because he has failed to show that the state courts resolved this claim in a manner contrary to or involving an unreasonable application of federal law as established by United States Supreme

Court precedent. Petition, p. 5, Ground A. Title 28 U.S.C. Section 2254(d) provides for the standard under which a federal habeas court should review a state court's application of federal law:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The United States Supreme Court stated in Wiggins v. Smith, 539 U.S. 510, 520-21 (2003):

In order for a federal court to find a state court's application of our precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. See Lockyer, supra, at ----, 123 S.Ct. 1166 (slip op., at 11). The state court's application must have been "objectively unreasonable." See Williams v. Taylor, supra, at 409, 120 S.Ct. 1495.

11. Horne's argument that the State committed a Brady violation did not involve any application of United States Supreme Court precedent. The Court of Criminal Appeals held that Horne's "Brady" claim was governed by Arizona v. Youngblood, 488 U.S. 51 (1988), rather than by Brady. State's Exhibit E, p. 4. In Youngblood, 488 U.S. at 55-58 (1988), the United States Supreme Court

distinguished the Brady situation from cases in which evidence had been lost or destroyed before the exculpatory value of such evidence could be determined. While the Youngblood majority acknowledged that the good or bad faith of the State was irrelevant when the State failed to disclose evidence that had been determined to have been material and exculpatory, it emphasized that a different standard should apply when the State failed “to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” Id. at 57. As the Court, quoting California v. Trombetta, 467 U.S. 479, 486 (1984), explained, “[w]henver potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.” For this reason, the Court held that the State was not required to preserve all material that had any “conceivable evidentiary significance” and that a defendant alleging that his due process rights had been violated because of lost evidence that was potentially exculpatory had to show that the police acted in bad faith. Youngblood, 488 U.S. at 58.

Because the State did not try to introduce at trial any of the evidence Horne claims to be potentially exculpatory, the Court of Criminal Appeals properly determined that Youngblood governed in this case. Its determination that Horne failed to meet the Youngblood standard was proper because, as Horne himself

conceded on direct appeal, the State's loss of the potential evidence did not involve any bad faith. See State's Exhibit B, pp. 16-17 (Horne admitted in his brief on direct appeal, "While the loss of the potentially exculpatory evidence seems in this instance to be truly inadvertent, it was inarguably negligent."). Horne has failed to cite any United States Supreme Court authority showing that he is entitled to a reversal of his conviction due to the allegedly negligent loss of evidence that the State did not seek to introduce at trial. Accordingly, he has failed to show that Alabama courts have applied any United States Supreme Court precedent in an objectively unreasonable manner and that he is entitled to habeas corpus relief on this issue.

12. Horne's argument that he is due to be resentenced without the application of the HFOA because he did not receive adequate notice of the prior felonies to be used to enhance his sentence is due to be denied because he has failed to show that the state courts resolved this claim in a manner contrary to or involving an unreasonable application of federal law as established by United States Supreme Court precedent. The Court of Criminal Appeals has stated that a trial court has discretion to determine the sufficiency of notice of prior felonies under the HFOA, as governed by "rules of reasonableness, fair play, and due process." Capps v. State, 630 So.2d 486, 489 (Ala. Crim. App. 1993). In finding that the trial court did not abuse its discretion in this case, the Court of Criminal

Appeals found that, although the State's written notice was untimely, the trial court's finding that Horne received timely oral notice during plea negotiations was supported by the record. State's Exhibit A (C. 85); State's Exhibit E, p. *8.

Indeed, Horne did not dispute at his sentencing hearing that such prior felonies were discussed during plea negotiations. State's Exhibit A (R. 113-114) Because Horne has not presented clear and convincing evidence showing otherwise, this Court must defer to the state court's finding that he received timely oral notice of his prior convictions. See U.S.C. § 2254(e)(1) ("In a proceeding instituted by application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). Although Horne cites Rule 410(4) of the Alabama Rules of Evidence to argue that plea negotiations cannot be used to show his knowledge of his prior felonies, this provision is merely a rule of evidence making such plea negotiations inadmissible as substantive evidence of guilt at trial. Motion to Amend, p. 3.

With regard to whether there was sufficient written notice of his prior felonies to be used to enhance his sentence, Horne claims that the prosecutor lied in open court about the time he mailed the written notice. Motion to Amend, p. 4. The record, however, shows that the written notice was filed on July 12, 2005, a

day before he was sentenced on July 13, 2005. State's Exhibit A (C. 2, 81)

Furthermore, although not relied upon by the Court of Criminal Appeals, the prior felonies were listed in Horne's presentence report. State's Exhibit A (C. 57) Even assuming that the written notice in this case was inadequate, the Court of Criminal Appeals held that, according to Alabama law, written notice is not required and that the oral notice was adequate in this case. State's Exhibit E, pp. 8-9.

The Court of Criminal Appeals' finding that Horne received adequate notice of his prior felonies used to enhance his sentence is consistent with the treatment federal courts have given this issue. In United States v. O'Neal, 180 F.3d 115, 125-26, fn 11 (4th Cir. 1999), the Fourth Circuit held that O'Neal's awareness of his prior conviction and inclusion of such conviction in a pre-sentence report were sufficient to establish that he received adequate notice. Horne has not cited, nor is the State aware of, any United States Supreme Court precedent requiring any more notice of prior felonies used to enhance a sentence. Accordingly, this claim should be denied.

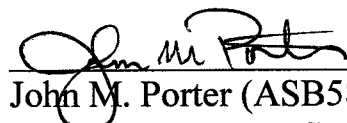
CONCLUSION

Based upon the foregoing authorities and facts, Horne's federal habeas corpus petition should be denied.

Respectfully submitted,

Troy King (KIN047)
Attorney General

By-

A handwritten signature in black ink, appearing to read "John M. Porter", is written over a horizontal line.

John M. Porter (ASB5818-P77J)
Assistant Attorney General

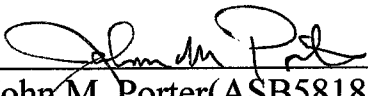
EXHIBITS

- Exhibit A - Record and transcript on direct appeal in Horne v. State, CR-04-2461. (Dale County Circuit Court, CC-04-122).
- Exhibit B - Initial Brief of the Appellant in Horne v. State, CR-04-2461.
- Exhibit C - Brief of the Appellee in Horton v. State, CR-04-2461.
- Exhibit D - Reply Brief of the Appellant in Horton v. State, CR-04-2461.
- Exhibit E - Court of Criminal Appeals decision in Horne v. State, CR-04-2461 (Ala. Crim. App. Aug. 23, 2005)(unpublished memorandum)
- Exhibit F - Application for Rehearing and supporting brief in CR-04-2461.
- Exhibit G - Court of Criminal Appeals's Order overruling Horne's application for rehearing in CR-04-2461).
- Exhibit H - Petition for writ of certiorari in Supreme Court of Alabama Case No. 1051770.
- Exhibit I - Supreme Court of Alabama order in Case No. 1051770 denying petition for writ of certiorari and issuing certificate of judgment.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2006, I served a copy of the foregoing (including all exhibits) on Horne, by placing the same in the United States Mail, first class, postage prepaid and addressed as follows:

Gary Horne
AIS #180206
Easterling Correctional Facility
P. O. Box 10
Clio, Alabama 36017-0010



John M. Porter(ASB5818-P77J)
Assistant Attorney General

Office of the Attorney General
Alabama State House
11 South Union
Montgomery, AL 36130-0152
Telephone: (334) 242-7300
Fax: (334) 242-2848

204077

Exhibit A

COURT OF CRIMINAL APPEALS NO. 04-2461

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF DALE COUNTY, ALABAMA

CIRCUIT COURT NO. CC -2004-122

CIRCUIT JUDGE P.B. McLAUCHLIN, JR.

Type of Conviction / Order Appealed From: ASSAULT II

Sentence Imposed: 22 YEARS

Defendant Indigent: ☒ YES ☐ NO

GARY HORNE

HON JOSEPH GALLO

334-598-6200

NAME OF APPELLANT

(Appellant's Attorney)

451 N. DALEVEILLE AVE STE 105

(Telephone No.)

(Address)

DALEVILLE

AL

36322

(City)

(State)

(Zip Code)

V.

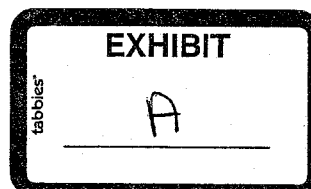
STATE OF ALABAMA

(State represented by Attorney General)

NAME OF APPELLEE

NOTE: If municipal appeal, indicate above, and enter name and address of municipal attorney below.

(For Court of Criminal Appeals Use Only)



INDEX:

CASE ACTION SUMMARY-----	01 - 09
AL ARREST REPORT -----	10
AFFIDAVIT OF SUBSTANTIAL HARDSHIP & ORDER -----	11 - 12
FIRST APPEARANCE HEARING -----	13
NOTICE OF APPOINTMENT -----	14
ENTRY OF APPEARANCE -----	15
DISCOVERY MOTION -----	16 - 18
MOTION FOR PRELIMINARY HEARING -----	19
NOTICE OF APPEARANCE -----	20
REQUEST FOR DISCOVERY -----	21 - 25
MOTION TO SET BOND -----	26
MOTION TO SET BAIL -----	27
MOTION TO WITHDRAW -----	28
ORDER TO WITHDRAW -----	29
ORDER TO SET BOND -----	30
DISCOVERY ORDER -----	31 - 32
CONSOLIDATE APPEARANCE BOND -----	33
INDICTMENT -----	34 - 35
PLEA OF NOT GUILTY & WAIVER -----	36
REQUEST FOR DISCOVERY -----	37 - 41
DISCOVERY ORDER -----	42 - 43
MOTION FOR CONTINUANCE -----	44 - 45

INDEX CONTINUATION:

MOTION TO COMPEL -----	46 - 47
NOTICE OF POTENTIAL CONFLICT -----	48 - 49
ORDER -----	50
MOTION FOR NEW TRIAL ON IN THE ALTERNATIVE FOR JUDGMENT NOTWITHSTANDING THE VERDICT -----	51 - 54
REPORT OF INVESTIGATION -----	55 - 60
MOTION TO CONTINUE -----	61 - 62
LETTER FROM DEF -----	63
MOTION TO CONTINUE -----	64 - 71
NOTIFICATION OF HABITUAL OFFENDER STATUS	72
TRANSCRIPT OF RECORD -----	73
MOTION FOR NEW TRIAL -----	74 - 76
MOTION TO VACATE SENTENCE -----	77 - 80
NOTIFICATION OF HABITUAL OFFENDER STATUS	81
LETTER FROM DEF -----	82 - 83
TRIAL COURT'S RULING ON MOTION FOR NEW TRIAL -----	84 - 86
NOTICE OF APPEAL MOTION TO APPOINT APPELLATE COUNSEL & MOTION FOR APPEAL BOND -----	87 - 88
MOTION TO WITHDRAW -----	89 - 90
POST TRIAL MOTION TO CLARIFY POST TRIAL RULING -----	91 - 93
MOTION TO RECUSE -----	94
MOTION TO DISMISS -----	95 - 97
NOTICE OF APPEAL -----	98
REPORTER'S TRANSCRIPT -----	99

INDEX CONTINUATION:

DOCKETING STATEMENT -----	100 -101
CLERK'S NOTICE OF APPEAL -----	102
CERTIFICATE OF COMPLETION & TRANSMITTAL OF RECORD ON APPEAL BY TRIAL CLERK	103 -104
COURT REPORTER'S COVER SHEET -----	01
COURT REPORTER'S PROCEEDINGS -----	02 -142
COURT REPORTER'S TRANSCRIPT -----	143

ACRO372 ALABAMA JUDICIAL INFORMATION SYSTEM CASE: CC 2004 000122.00
 OPER: SHS CASE ACTION SUMMARY
 PAGE: 1 CIRCUIT CRIMINAL RUN DATE: 03/05/2004
 THE CIRCUIT COURT OF DALE JUDGE: PBM

STATE OF ALABAMA VS HORNE GARY
 LOT 46
 CASE: CC 2004 000122.00 HIDDEN GROVE TRAILER PARK
 OZARK, AL 36360 0000

DOB: 10/16/1972 SEX: M RACE: B HT: 6 00 WT: 180 HR: BLK EYES: BRO
 SEN: 416983121 ALIAS NAMES:

CHARGED1: ATTEMPT - MURDER CODE01: MURDA LIT: ATTEMPT - MURD TYP: F #: 001
 OFFENSE DATE: AGENCY/OFFICER: 0260100 TEX TIP

DATE WAR/CAP ISS: DATE ARRESTED: 01/16/2004
 DATE INDICTED: 03/02/2004 DATE FILED: 03/09/2004
 DATE RELEASED: 01/30/2004 DATE HEARING:
 BOND AMOUNT: \$30,000.00 SURETIES:

DATE 1: 04/06/2004 DESC: ARRG TIME: 0900 A
 DATE 2: DESC: TIME: 0000

TRACKING NOS: GJ 2004 000003 00 DC 2004 000089 00 / WR 2004 000044 00
 W/D 9/1/05 *Robinson, R.G. Daff Jones*
 DEF/ATY: NICKSON N TRACT W/D 8/29/05 TYPE: A
 2101 A A CUBBS FORD RD
 PRATTVILLE AL 36066 000000

PROSECUTOR: EMERY DAVID C

OTH CSE: GJ200400002800 CHK/TICKET NO: GRAND JURY: 28
 C AT REPORTER: SID NO: 000000000
 C STATUS: BOND DEMAND: OPER: SHS

DATE	ACTIONS, JUDGEMENTS, AND NOTES
3/26/04	Plea of N/G & waiver of Arrg. filed by Hon. Nickson.
3/29/04	Request for Discovery.
3/29/04	Discovery Order. cy: DA/NICKSON
4/27/04	Motion for continuance.
4/27/07	<i>Continued in D. PBM cy: DA/Nickson</i>
5-14-04	Motion to Compel filed.
5/14/07	<i>Set to address D on his counsel to inspect evidence in counsel at the scene of the crime. PBM cy: DA/Nickson</i>
MAY 14 2004	
9/3/04	Motion to dismiss.
9-3-04	<i>Motion will be heard prior to trial. 5/10/04.</i>
SEP - 3 2004	<i>cy: DA/Nickson</i>
9/17/07	<i>Continued in D. PBM</i>
11/15/07	<i>Motion set for 16 at 9:30-AM cy: DA/Nickson</i>
	<i>-over-</i>

CASE: CC 2004 000122.00
JUDGE ID: PBM

DATE	ACTION:	JUDGEMENTS:	CASE NOTES:
11/1/78	1. Review of case file	1. Review of case file	1. Review of case file
11/2/78	2. Review of case file	2. Review of case file	2. Review of case file
11/3/78	3. Review of case file	3. Review of case file	3. Review of case file
11/4/78	4. Review of case file	4. Review of case file	4. Review of case file
11/5/78	5. Review of case file	5. Review of case file	5. Review of case file
11/6/78	6. Review of case file	6. Review of case file	6. Review of case file
11/7/78	7. Review of case file	7. Review of case file	7. Review of case file
11/8/78	8. Review of case file	8. Review of case file	8. Review of case file
11/9/78	9. Review of case file	9. Review of case file	9. Review of case file
11/10/78	10. Review of case file	10. Review of case file	10. Review of case file
11/11/78	11. Review of case file	11. Review of case file	11. Review of case file
11/12/78	12. Review of case file	12. Review of case file	12. Review of case file
11/13/78	13. Review of case file	13. Review of case file	13. Review of case file
11/14/78	14. Review of case file	14. Review of case file	14. Review of case file
11/15/78	15. Review of case file	15. Review of case file	15. Review of case file
11/16/78	16. Review of case file	16. Review of case file	16. Review of case file
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11/20/78	20. Review of case file	20. Review of case file	20. Review of case file
11/21/78	21. Review of case file	21. Review of case file	21. Review of case file
11/22/78	22. Review of case file	22. Review of case file	22. Review of case file
11/23/78	23. Review of case file	23. Review of case file	23. Review of case file
11/24/78	24. Review of case file	24. Review of case file	24. Review of case file
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11/26/78	26. Review of case file	26. Review of case file	26. Review of case file
11/27/78	27. Review of case file	27. Review of case file	27. Review of case file
11/28/78	28. Review of case file	28. Review of case file	28. Review of case file
11/29/78	29. Review of case file	29. Review of case file	29. Review of case file
11/30/78	30. Review of case file	30. Review of case file	30. Review of case file

2/28/05 - PM

3/1/05 Cont'd. to def. K's

6-21-05 Sentencing hearing set for July 13, 2005, at
9:30 A.M. 65/P.B.M.
by DA Jackson PJP

7/13/05 Cory Carrel at Sertemy Henry, on
the Verdict, the jury agreed, Assault
the 2nd degree. The Court finds the D guilty
of a felony the D guilty the Court finds that
the D is a habitual offender with 2 prior
felonies + that the D used a firearm
the Commission of the Assault & Based on
the D's prior record + the nature of
this assault the Court sentences the D to
22 yrs to the State Pen.

H. L. H. is ordered to be released
D is being sentenced to 22 years to the
D is to pay C.C., residents to Victoria to V.C.C., +
100% to V.C.C. D now will be under, it
Stamps to the Executive, to the Judge. No answer,
P.S. + H.L. + appeal to the High. PH
Cy: DA/Nickson BCSO Doc

ACRO369 ALABAMA JUDICIAL INFORMATION CENTER

CASE ACTION SUMMARY
CONTINUATIONCASE: CC 2004 000122.00
JUDGE ID: PBM

STATE OF ALABAMA VS HORNE GARY

DATE ACTION, JUDGMENTS, CASE NOTES

8/29/05 Motion to Clarify Post Trial Ruling denied.

8/29/05 Motion to withdraw appeal.

8/29/05 Hon. Bob Robison appointed to rep. of Da
Appeal - Notify Bob. Need to file Motion,
Appeal. PR by DA/Nickson/Robison9/1/05 Motion to Revoke ~~Appeal~~ granted. PR9/1/05 Son for Sale. Appointed to report
to on appeal. Notify me - Need to
file Motion, Appeal. PR
by DA/Balto/

ACRO370 ALABAMA JUDICIAL INFORMATION SYSTEM CASE: CC 2004 000122.00
 OPER: SHS CASE ACTION SUMMARY
 PAGE: 1 CIRCUIT CRIMINAL RUN DATE: 09/07/2005
 I. THE CIRCUIT COURT OF DALE JUDGE: PBM

STATE OF ALABAMA VS HORNE GARY
 LOT 46
 CASE: CC 2004 000122.00 HIDDEN GROVE TRAILER PARK
 OZARK, AL 36360 0000

DOB: 10/16/1972 SEX: M RACE: B HT: 6 00 WT: 180 HR: BLK EYES: BRO
 SSN: 416983121 ALIAS NAMES:
 CHARGE01: ATTEMPT - MURDER CODE01: MURDA LIT: ATTEMPT - MURD TYP: F #: 001
 OFFENSE DATE: AGENCY/OFFICER: 0260100 TEX TIP

DATE WAR/CAP ISS: DATE ARRESTED: 01/16/2004
 DATE INDICTED: 03/02/2004 DATE FILED: 03/03/2004
 DATE RELEASED: 01/30/2004 DATE HEARING:
 BOND AMOUNT: \$30,000.00 SURETIES:

DATE 1: 08/04/2005 DESC: MOTD TIME: 0930 A
 DATE 2: DESC: TIME: 0000

TRACKING NOS: GJ 2004 000028 00 / DC 2004 000089 00 / WR 2004 000044 00

DEF/ATY: GALLO JOSEPH JAMES TYPE: A TYPE:
 451 N DALEVILLE AVE
 SUITE 105
 DALEVILLE AL 36322 00000

PROSECUTOR: ADAMS THOMAS KIRKE

OTH CSE: GJ200400002800 CHK/TICKET NO: GRAND JURY: 28
 COURT REPORTER: SID NO: 0000000000
 STATUS: BOND DEMAND: OPER: SHS

TRANS DATE	ACTIONS, JUDGEMENTS, AND NOTES	OPE
03/05/2004	ASSIGNED TO: (PBM) P. B. MCLAUCHLIN (AR01)	SHS
03/05/2004	INITIAL STATUS SET TO: "B" - BOND (AR01)	SHS
03/05/2004	FILED ON: 03/03/2004 (AR01)	SHS
03/05/2004	DEFENDANT ARRESTED ON: 01/16/2004 (AR01)	SHS
03/05/2004	DEFENDANT INDICTED ON: 03/02/2004 (AR01)	SHS
03/05/2004	ATTORNEY FOR DEFENDANT: NICKSON N TRACY (AR01)	SHS
03/05/2004	BOND SET AT: \$30000.00 (AR01)	SHS
03/05/2004	DEFENDANT RELEASED FROM JAIL: 01/30/2004 (AR01)	SHS
03/05/2004	SET FOR: ARRAIGNMENT ON 04/06/2004 AT 0900A (AR01)	SHS
03/05/2004	CHARGE 01: ATTEMPT - MURDER/#CNTS: 001 (AR01)	SHS
03/05/2004	CASE ACTION SUMMARY PRINTED (AR10)	SHS
03/22/2004	NOTICE SENT: 03/22/2004 DIAZ BONDING CO	SHS
03/22/2004	NOTICE SENT: 03/22/2004 NICKSON N TRACY	SHS
03/22/2004	NOTICE SENT: 03/22/2004 HORNE GARY	SHS
03/26/2004	SET FOR: JURY TRIAL ON 05/17/2004 AT 0900A (AR01)	SHS
03/26/2004	PLEA OF N/G & WAIVER OF ARRG FILED BY HON	SHS
03/26/2004	NICKSON	SHS

ACRO370 ALABAMA JUDICIAL INFORMATION SYSTEM CASE: CC 2004 000122.00
 OPER: SHS CASE ACTION SUMMARY
 PAGE: 2 CIRCUIT CRIMINAL RUN DATE: 09/07/2005
 =====
 IN THE CIRCUIT COURT OF DALE JUDGE: PBM

STATE OF ALABAMA

VS

HORNE GARY

LOT 46

C/ : CC 2004 000122.00

HIDDEN GROVE TRAILER PARK
 OZARK, AL 36360 0000

DOB: 10/16/1972 SEX: M RACE: B HT: 6 00 WT: 180 HR: BLK EYES: BRO
 SSN: 416983121 ALIAS NAMES:

TRANS DATE	ACTIONS, JUDGEMENTS, AND NOTES	OPE
03/29/2004	REQUEST FOR DISC	SHS
04/19/2004	NOTICE SENT: 04/19/2004 NICKSON N TRACY	SHS
04/19/2004	NOTICE SENT: 04/19/2004 HORNE GARY	SHS
04/19/2004	SET FOR: JURY TRIAL ON 05/18/2004 AT 0900A (AR10)	SHS
04/21/2004	WITNESS SUBPOENA ISSUED AWP24	MAH
04/23/2004	SERVICE OF SERVED PERSON ON 04222004 FOR W001 (A	LYK
04/23/2004	SERVICE OF SERVED PERSON ON 04222004 FOR W003 (A	LYK
04/23/2004	SERVICE OF SERVED PERSON ON 04222004 FOR W004 (A	LYK
04/27/2004	MOTION FOR CONTINUANCE	SHS
04/27/2004	CONT'D FOR THE DEF	SHS
04/28/2004	SET FOR: JURY TRIAL ON 09/13/2004 AT 0900A (AR01)	SHS
04/28/2004	SERVICE OF OTHER ON 04282004 FOR W005 (A	LYK
04/28/2004	SERVICE OF OTHER ON 04272004 FOR W006 (A	LYK
05/14/2004	STATE TO ADDRESS DEF OR HIS COUNSEL TO INSPECT	SHS
5/14/2004	EVIDENCE RECOVERED AT THE SEEN OF THE CRIME	SHS
05/14/2004	MOTION TO COMPEL FILED.	DEW
08/11/2004	NOTICE SENT: 08/11/2004 NICKSON N TRACY	SHS
08/11/2004	NOTICE SENT: 08/11/2004 HORNE GARY	SHS
08/11/2004	SET FOR: JURY TRIAL ON 09/14/2004 AT 0900A (AR10)	SHS
08/12/2004	WITNESS SUBPOENA ISSUED AWP24	MAH
08/17/2004	ENF STATUS SET TO: "K" (EC01)	SHS
09/03/2004	MOTION TO DISMISS	SHS
09/03/2004	MOTION WILL BE HEARD PRIOR TO TRIAL.	DEW
09/15/2004	SET FOR: JURY TRIAL ON 11/15/2004 AT 0900A (AR10)	DEW
10/20/2004	NOTICE SENT: 10/20/2004 NICKSON N TRACY	SHS
10/20/2004	NOTICE SENT: 10/20/2004 HORNE GARY	SHS
10/20/2004	CAS ATTACHMENT PRINTED (AR08)	SHS
10/22/2004	WITNESS SUBPOENA ISSUED AWP24	MAH
11/04/2004	PARTY ADDED W007 REX TIPTON (AW21)	SHS
11/04/2004	PARTY W007 ISSUED DATE: 11042004 TYPE: (AW21)	SHS
11/04/2004	PARTY ADDED W008 MARTIN SPEARS (AW21)	SHS

ACRO370 ALABAMA JUDICIAL INFORMATION SYSTEM CASE: CC 2004 000122.00
 OPER: SHS CASE ACTION SUMMARY
 PAGE: 3 CIRCUIT CRIMINAL RUN DATE: 09/07/2005
 =====
 IN THE CIRCUIT COURT OF DALE JUDGE: PBM

STATE OF ALABAMA

VS

HORNE GARY

LOT 46

C : CC 2004 000122.00

HIDDEN GROVE TRAILER PARK
 OZARK, AL 36360 0000

DOB: 10/16/1972 SEX: M RACE: B HT: 6 00 WT: 180 HR: BLK EYES: BRO
 SSN: 416983121 ALIAS NAMES:

11/04/2004	PARTY W008 ISSUED DATE: 11042004 TYPE:	(AW21)	SHS
11/04/2004	PARTY ADDED W009 TERRANCE BARR	(AW21)	SHS
11/04/2004	PARTY W009 ISSUED DATE: 11042004 TYPE:	(AW21)	SHS
11/04/2004	PARTY ADDED W010 IMOGENE PAUL	(AW21)	SHS
11/04/2004	PARTY W010 ISSUED DATE: 11042004 TYPE:	(AW21)	SHS
11/04/2004	PARTY ADDED W011 JOHN BELL	(AW21)	SHS
11/04/2004	PARTY W011 ISSUED DATE: 11042004 TYPE:	(AW21)	SHS
11/04/2004	PARTY ADDED W012 LT KEITH CAUTHEN	(AW21)	SHS
11/04/2004	PARTY W012 ISSUED DATE: 11042004 TYPE:	(AW21)	SHS
11/04/2004	PARTY ADDED W013 LT BOBBY BLANKENSHIP	(AW21)	SHS
11/04/2004	PARTY W013 ISSUED DATE: 11042004 TYPE:	(AW21)	SHS
11/04/2004	PARTY ADDED W014 CHRIS FORD	(AW21)	SHS
11/04/2004	PARTY W014 ISSUED DATE: 11042004 TYPE:	(AW21)	SHS
11/24/2004	SET FOR: MOTION DOCKET/HEAR ON 12/16/2004 AT 0930A		SHS
11/24/2004	SET FOR: JURY TRIAL ON 02/28/2005 AT 0900A (AR10)		SHS
2/16/2004	MOTION TO DISMISS FILED BY THE DEF DENIED		SHS
01/28/2005	COPY OF PETITION OF WRIT OF MANDAMUS FILED ALONG		SHS
01/28/2005	WITH ORDER FROM CT OF CRIM APPLS		SHS
02/08/2005	NOTICE SENT: 02/08/2005 NICKSON N TRACY		SHS
02/08/2005	NOTICE SENT: 02/08/2005 HORNE GARY		SHS
02/11/2005	WITNESS SUBPOENA ISSUED	AWP24	AMB
03/01/2005	CONT'D FOR DEF		SHS
03/03/2005	SET FOR: JURY TRIAL ON 05/16/2005 AT 0900A (AR01)		SHS
04/26/2005	WITNESS SUBPOENA ISSUED	AWP24	AMB
05/02/2005	NOTICE OF POTENTIAL CONFLICT FILED BY HON NICKSON		SHS
05/02/2005	READ NO ACTION TAKEN		SHS
05/16/2005	PARTY ADDED W015 SHANIECE HORNE	(AW21)	SHS
05/16/2005	WITNESS SUBPOENA ISSUED TO W015 SHANIECE HORNE		SHS
05/17/2005	PARTY ADDED W016 CHRISTINA WILLIAMS	(AW21)	AMB
05/17/2005	PARTY W016 ISSUED DATE: 05162005 TYPE:	(AW21)	AMB
05/17/2005	WITNESS SUBPOENA ISSUED TO W016 CHRISTINA WILLIAMS		AMB
05/18/2005	JUROR FELONY FLAG SET ON FOR INDIVIDUAL	(AR10)	SHS

ACRO370 ALABAMA JUDICIAL INFORMATION SYSTEM CASE: CC 2004 000122.00
 OPER: SHS CASE ACTION SUMMARY
 PAGE: 4 CIRCUIT CRIMINAL RUN DATE: 09/07/2005

IN THE CIRCUIT COURT OF DALE JUDGE: PBM

STATE OF ALABAMA

VS

HORNE GARY

LOT 46

C : CC 2004 000122.00

HIDDEN GROVE TRAILER PARK
 OZARK, AL 36360 0000

DOB: 10/16/1972 SEX: M RACE: B HT: 6 00 WT: 180 HR: BLK EYES: BRO
 SSN: 416983121 ALIAS NAMES:

05/18/2005	CHARGE 01 DISPOSED BY: CONVICTED ON: 05/18/2005	SHS
05/18/2005	DISPOSITION JUDGE ID CHANGED FROM: TO: PBM	SHS
05/18/2005	CHARGE 01: ASSAULT 2ND DEGREE /#CNTS: 001 (AR10)	SHS
05/18/2005	CASE TRIED TO JURY JURY RETURNED THE FOLLOWING	SHS
05/18/2005	VERDICT GUILTY OF ASSAULT 2ND PRE-SENT INV	SHS
05/18/2005	SENTENCING DELAYED SENTENCING HEARING SAME BOND	SHS
05/20/2005	SET FOR: SENTENCING DKT/HE ON 07/14/2005 AT 0930A	SHS
06/01/2005	CONVICTION REPORT TO BOARD OF REGISTRARS	SHS
06/21/2005	WITNESS SUBPOENAS ISSUED	SHS
06/21/2005	MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE FOR	SHS
06/21/2005	JUDGMENT NOTWITHSTANDING THE VERDICT	SHS
06/22/2005	SET FOR: SENTENCING DKT/HE ON 07/13/2005 AT 0930A	SHS
07/01/2005	WITNESS SUBPOENA ISSUED TO W009 TERRANCE BARR	AMB
07/01/2005	WITNESS SUBPOENA ISSUED TO W009 TERRANCE BARR	AMB
07/08/2005	REPORT OF INVESTIGATION	SHS
7/08/2005	REPORT OF INVESTIGATION	SHS
07/11/2005	SENTENCING HEARING CONT TO JULY 13 @ 1:30	SHS
07/11/2005	MOTION FOR NEW TRIAL SET 8/4/05@ 9:30 AM	SHS
07/11/2005	MOTION TO CONTINUE FILED BY HON NICKSON	SHS
07/12/2005	SET FOR: MOTION DOCKET/HEAR ON 08/04/2005 AT 0930A	SHS
07/12/2005	NOTIFICATION OF HABITUAL OFFENDER STATUS	SHS
07/13/2005	CASE CALLED AT SENT HEARING ON THE VERDICT OF	SHS
07/13/2005	THE JURY OF GUILTY OF ASSAULT ON 2ND DEGREE	SHS
07/13/2005	THE JURY	SHS
07/13/2005	THE COURT FINDS THE DEF GUILTY & ADJS THE DEF	SHS
07/13/2005	GUILTY THE COURT FINDS THE DEF IS AN HABITUAL	SHS
07/13/2005	OFFENDER WITH 2 PRIOR FELONIES & THAT THE DEF	SHS
07/13/2005	FIRE A FIREARM IN THE COMMISSION OF THE ASSAULT	SHS
07/13/2005	& BASED ON THE DEF'S PRIORRECORD & THE NATURE OF	SHS
07/13/2005	THIS ASSAULT THE COURT SENT THE DEF TO 22 YRS TO	SHS
07/13/2005	STATE PEN THEREFORE IT IS ORDERED & ADJ THAT THE	SHS
07/13/2005	DEF IS SENTENCED TO 22 YRS TO THE STATE PEN DEF	SHS

ACRO370 ALABAMA JUDICIAL INFORMATION SYSTEM CASE: CC 2004 000122.00
 OPER: SHS CASE ACTION SUMMARY
 PAGE: 5 CIRCUIT CRIMINAL RUN DATE: 09/07/2005
 =====
 IN THE CIRCUIT COURT OF DALE JUDGE: PBM

STATE OF ALABAMA VS HORNE GARY
 LOT 46
 C : CC 2004 000122.00 HIDDEN GROVE TRAILER PARK
 OZARK, AL 36360 0000

DOB: 10/16/1972 SEX: M RACE: B HT: 6 00 WT: 180 HR: BLK EYES: BRO
 SSN: 416983121 ALIAS NAMES:

07/13/2005	IS TO PAY CC REST & VICTIM AT THE VCC & 100.00	SHS
07/13/2005	TO THE VCC DEF REMANDED TO CUSTODY OF THE SHERI	SHS
07/13/2005	FOR THE EXECUTION OF THE SENTENCE DEF ADVISED OF	SHS
07/13/2005	POST TRIAL & APPEAL RIGHTS	SHS
07/14/2005	DEFENDANT SENTENCED ON: 07/13/2005 (AR05)	SHS
07/14/2005	IMPOSED CONFINEMENT: 22 YEARS (AR05)	SHS
07/14/2005	TOTAL CONFINEMENT: 22 YEARS (AR05)	SHS
07/14/2005	SENTENCE TO BEGIN ON: 07/13/2005 (AR05)	SHS
07/14/2005	COST PROVISION ORDERED BY THE COURT (AR05)	SHS
07/14/2005	SUBPOENA FEE PROVISION ORDERED BY THE COURT (AR05)	SHS
07/14/2005	RESTITUTION FOR R001 ORDERED BY THE COURT (AR05)	SHS
07/14/2005	CVCC PROVISION ORDERED BY THE COURT (AR05)	SHS
07/14/2005	HISTORY FEE PROVISION ORDERED BY THE COURT (AR05)	SHS
07/14/2005	PENITENTIARY PROVISION ORDERED BY THE COURT (AR05)	SHS
07/14/2005	HABITUAL OFFENDER - #OFFENSES: 002 (AR05)	SHS
7/14/2005	HABITUAL OFFENDER PROVISION ORDERED BY THE COURT	SHS
07/14/2005	PAYMENT FREQUENCY SET TO: "L" (FE52)	SHS
07/14/2005	DEF SENT TO 22 YRS TO DOC (FE52)	SHS
07/14/2005	JAIL CREDIT: 014 DAYS (AR05)	SHS
07/14/2005	TRANSCRIPT OF RECORD ISSUED: 07/14/2005 (AR08)	SHS
07/14/2005	CAS ATTACHMENT PRINTED (AR08)	SHS
07/19/2005	WITNESS SUBPOENA ISSUED TO W009 TERRANCE BARR	AMB
07/26/2005	SERVICE OF SERVED PERSON ON 07222005 FOR W009 (A	SHS
07/26/2005	SET FOR: MOTION DOCKET/HEAR ON 08/04/2005 AT 0930A	SHS
07/28/2005	MOTION TO VACATE SENTENCE & MOTION FOR NEW TRIAL	SHS
07/28/2005	FILED BY HON NICKSON	SHS
08/19/2005	TRIAL COURT RULING ON MOTION FOR NEW TRIAL	SHS
08/19/2005	THIS CAUSE COMING ON TO BE HEARD IS SUBMITTED	SHS
08/19/2005	FOR A JUDGMENT ON THE MOTION FOR NEW TRIAL OR IN	SHS
08/19/2005	ALTERNATIVE MOTION FOR JUDGMENT NOTWITHSTANDING	SHS
08/19/2005	THE VERDICT & THE MOTION TO VACATE THE SENTENCE &	SHS
08/19/2005	THE COURT HAVING CONSIDERED THE SAME THE COURT	SHS

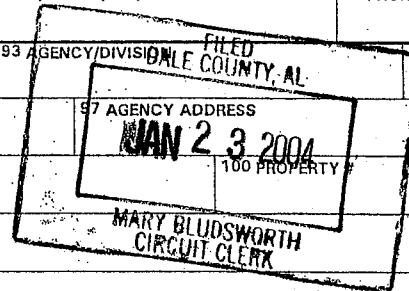
ALABAMA UNIFORM ARREST REPORT

Fingerprinted	R84 Completed
<input checked="" type="checkbox"/> Yes	<input checked="" type="checkbox"/> Yes
<input type="checkbox"/> No	<input type="checkbox"/> No

03TF01202

OFFICER'S WORK PRODUCT MAY NOT BE PUBLIC INFORMATION

IDENTIFICATION	1 ORI # 0 2 6 0 1 0 0	2 AGENCY NAME OZARK POLICE DEPARTM	3 CASE # 0 4 0 1 - 0 3 5 7	4 SFX	
	5 LAST, FIRST, MIDDLE NAME HORNE, GARY		6 ALIAS AKA		
	7 SEX <input checked="" type="checkbox"/> M <input type="checkbox"/> F	8 RACE <input type="checkbox"/> W <input checked="" type="checkbox"/> B <input type="checkbox"/> A <input type="checkbox"/> I	9 HGT. 6' 00"	10 WGT. 175	11 EYE BRO
	12 HAIR BLK	13 MED	14 <input type="checkbox"/> SCARS BOTH ARMS	<input checked="" type="checkbox"/> MARKS	
ARREST	15 PLACE OF BIRTH (CITY, COUNTY, STATE) TUSKEE MACON AL		16 SSN 4 1 6 - 9 8 - 3 1 2 1	17 DATE OF BIRTH 1 0 1 6 7 2	
	18 AGE 031	19 MISCELLANEOUS ID # S416983121			
	20 SID #	21 FINGERPRINT CLASS KEY MAJOR PRIMARY SCDV SUB-SECONDARY FINAL	22 DL # 6301217	23 ST AL	
	24 FBI #	25 IDENTIFICATION COMMENTS			
	26 <input checked="" type="checkbox"/> RESIDENT <input type="checkbox"/> NON-RESIDENT	27 HOME ADDRESS (STREET, CITY, STATE, ZIP) #46 HIDDEN GROVE TR. PARK OZARK, AL 36360	28 RESIDENCE PHONE (334) 445-4402	29 OCCUPATION (BE SPECIFIC) HORNE ROOFING	
	30 EMPLOYER (NAME OF COMPANY/SCHOOL)		31 BUSINESS ADDRESS (STREET, CITY, STATE, ZIP)	32 BUSINESS PHONE (334) 477-3314	
	33 LOCATION OF ARREST (STREET, CITY, STATE, ZIP) DRUG TASK FORCE OZARK, AL 36360		34 SECTOR #	35 ARRESTED FOR YOUR JURISDICTION? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
	36 CONDITION OF <input type="checkbox"/> DRUNK <input checked="" type="checkbox"/> SOBER ARRESTEE: <input checked="" type="checkbox"/> DRINKING <input type="checkbox"/> DRUGS	37 RESIST ARREST? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	38 INJURIES? <input checked="" type="checkbox"/> NONE	39 ARMED? <input type="checkbox"/> Y <input checked="" type="checkbox"/> N	
	40 DESCRIPTION OF WEAPON <input type="checkbox"/> HANDGUN <input type="checkbox"/> OTHER FIREARM	41 DATE OF ARREST 0 1 1 6 0 4			
	42 TIME OF ARREST 01:15	43 DAY OF ARREST S M T W T F S	44 TYPE ARREST <input type="checkbox"/> ON VIEW <input checked="" type="checkbox"/> CALL <input type="checkbox"/> WARRANT	45 ARRESTED BEFORE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
46 CHARGE - 1 <input checked="" type="checkbox"/> FEL <input type="checkbox"/> MISD ASSAULT NON-FAMILY GUN	47 UCR CODE 1305	48 CHARGE - 2 <input type="checkbox"/> FEL <input type="checkbox"/> MISD	49 UCR CODE		
50 STATE CODE/LOCAL ORDINANCE 013A-06-0020	51 WARRANT #	52 DATE ISSUED M D Y	53 STATE CODE/LOCAL ORDINANCE		
54 CHARGE - 3 <input type="checkbox"/> FEL <input type="checkbox"/> MISD	55 UCR CODE	56 CHARGE - 4 <input type="checkbox"/> FEL <input type="checkbox"/> MISD	57 UCR CODE		
58 STATE CODE/LOCAL ORDINANCE	59 WARRANT #	60 DATE ISSUED M D Y	61 STATE CODE/LOCAL ORDINANCE		
62 CHARGE - 5 <input type="checkbox"/> FEL <input type="checkbox"/> MISD	63 UCR CODE	64 CHARGE - 6 <input type="checkbox"/> FEL <input type="checkbox"/> MISD	65 UCR CODE		
66 ARREST DISPOSITION <input checked="" type="checkbox"/> HELD <input type="checkbox"/> TOT - LE <input type="checkbox"/> BAIL <input type="checkbox"/> OTHER	67 IF OUT ON RELEASE WHAT TYPE?	68 ARRESTED WITH (1) ACCOMPLICE (FULL NAME)			
69 ARRESTED WITH (2) ACCOMPLICE (FULL NAME)					
VEHICLE	70 VYR	71 VMA	72 VMO	73 VST	
	74 VCO TOP BOTTOM	75 TAG #	76 LIS	77 LIY	
	78 VIN	79 IMPOUNDED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	80 STORAGE LOCATION/IMPOUND #		
	81 OTHER EVIDENCE SEIZED/PROPERTY SEIZED				
JUVENILE	82 JUVENILE DISPOSITION: <input type="checkbox"/> HANDLED AND RELEASED <input type="checkbox"/> REF. TO WELFARE AGENCY <input type="checkbox"/> REF. TO ADULT COURT <input checked="" type="checkbox"/> REF. TO JUVENILE COURT <input type="checkbox"/> REF. TO OTHER POLICE AGENCY			83 RELEASED TO	
	84 PARENT OR GUARDIAN (LAST, FIRST, MIDDLE NAME)		85 ADDRESS (STREET, CITY, STATE, ZIP)	86 PHONE	
	87 PARENTS EMPLOYER	88 OCCUPATION	89 ADDRESS (STREET, CITY, STATE, ZIP)	90 PHONE	
	91 DATE AND TIME OF RELEASE M D Y <input type="checkbox"/> 1. AM <input checked="" type="checkbox"/> 2. PM				
RELEASE	92 RELEASING OFFICER NAME		93 AGENCY/DIVISION	94 ID #	
	95 RELEASED TO:		96 AGENCY/DIVISION	97 AGENCY ADDRESS	
	98 PERSONAL PROPERTY RELEASED TO ARRESTEE <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> PARTIAL		99 PROPERTY NOT RELEASED / HELD AT:		
	100 REMARKS (NOTE ANY INJURIES AT TIME OF RELEASE)				
101 SIGNATURE OF RECEIVING OFFICER		102 SIGNATURE OF RELEASING OFFICER		103 LOCAL USE	
104 CASE #		105 SFX		106 CASE #	
107 SFX		108 CASE #		109 SFX	
110 ADDITIONAL CASES CLOSED <input type="checkbox"/> Y <input checked="" type="checkbox"/> N		111 ARRESTING OFFICER (LAST, FIRST, M.) TIPTON, REX		112 ID # 00105	
113 ARRESTING OFFICER (LAST, FIRST, M.) RUSSELL, WALTON		114 ID # 00132		115 SUPERVISOR ID #	
116 WATCH CMDR. TIPTON		117 ID # 00105			



State of Alabama DALE COUNTY Form C-10 Page 1 of 2 Rev. 2/95	AFFIDAVIT OF SUBSTANTIAL HARDSHIP AND ORDER	Case Number 0401-0357
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IN THE	DISTRICT	COURT OF	DALE	COUNTY
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☒ STATE OF ALABAMA v. Gary Horne, Defendant
 CHARGE(S): Attempted Murder
 TYPE OF PROCEEDING: FIRST APPEARANCE

☐ CIVIL CASE-- I, because of substantial hardship, am unable to pay the docket fee and service fees in this case. I request that payment of these fees be waived initially and taxed as costs at the conclusion of the case.
☐ CIVIL CASE-- (such as paternity, support, termination of parental rights, dependency)-- I request an attorney be appointed for me.
☒ CRIMINAL CASE-- I am financially unable to hire an attorney and request that the Court appoint one for me.
☐ DELINQUENCY/NEED OF SUPERVISION- I am financially unable to hire an attorney and request that the Court appoint one for my child.

I N C O M E / E M P L O Y M E N T	<p style="text-align: center;">AFFIDAVIT</p> <p>A. Do you have a job or work for yourself? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Employer's name and address <u>Horne's Roofing</u></p> <p><u>Dorhan AL</u></p> <p>How much money do you take home each week? + \$ <u>360⁰⁰ - 400⁰⁰</u></p> <p>B. If unemployed, give month and year of last employment and amount earned per month \$ _____</p> <p>C. Does your husband or wife have a job? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>Employer's name and address _____</p> <p>How much money does he/she take home each week? + \$ _____</p> <p>D. Do you receive money or benefits from any other source? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>(Example: retirement pay, social security, workmen's compensation, unemployment compensation, food stamp payments, interest, dividends, etc.)</p> <p>How much do you receive each month? + \$ _____</p>
---	---

A S S E T S	<p>A. Do you have any money in any bank, savings and loan, credit union, or any other place, including cash on hand? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>Where? _____ How much? + \$ _____</p> <p>B. Do you own anything else of value? (Land, house, boat, television, stereo, jewelry, car, truck, van, stocks, bonds, etc.) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>What? _____</p> <p style="text-align: right;">Total Value + \$ _____</p>
----------------------------	---

D E P E N D E N T S	<p>A. Are you: <input checked="" type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Widowed <input type="checkbox"/> Divorced <input type="checkbox"/> Separated?</p> <p>B. Do you have any dependents? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Who and what relationship? <u>3 children 2 sons 1 daughter</u></p>
--	--

0 011

Form C-10 Page 2 of 2 Rev. 2/95

AFFIDAVIT OF SUBSTANTIAL HARDSHIP AND ORDER

What does it cost you to live each month?

\$ 400.⁰⁰

Creditor

Total Debt

Monthly Payment

Loans

Charge Accounts

House or rent payments

Alimony

Support

Car payment

Groceries

Utilities

D
E
B
T
S

\$

\$

250.⁰⁰150.⁰⁰

In support of this request, I have answered the above questions relating to my ability to pay. I swear that these answers are true and reflect my present financial status. I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

I further understand and acknowledge that if the Court appoints an attorney to represent me, the Court may require me to pay the fees and expenses of my court-appointed counsel.

Sworn to and subscribed before me this

_____ day of _____, 20____.

Judge/Notary

X Ray
Affiant Signature

Home Address Cot 46 Hidden Grove Tractor
Ozark AL 36360

Social Security Number 416-98-3121Date of Birth 10-16-72

ORDER

IT IS ORDERED THAT THE FOREGOING REQUEST BE:

☒ GRANTED☐ DENIED

APPOINTMENT OF ATTORNEY:

IT IS THEREFORE, ORDERED AND ADJUDGED BY THE COURT THAT

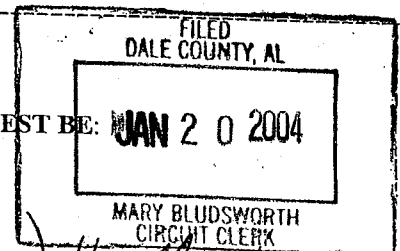
_____ Attorney at Law, be and is hereby appointed as counsel to represent, assist and defend

in this (these) case(s).

It is further ordered that the Court reserves the right and may order reimbursement of attorney's fees and expenses, approved by the Court and paid to the appointed counsel.

DONE this 16th day of _____, 2004.

Judge



Will Matthews

0 012

STATE OF ALABAMA,
PLAINTIFF.

IN THE DISTRICT COURT OF

DALE COUNTY, ALABAMA

VS.

CRIMINAL

DIVISION

Gary Horne
DEFENDANT.

CASE NUMBER 0401-0357

FIRST APPEARANCE HEARING

This is a first appearance hearing. You are charged with a violation of

Attempted Murder

and a primary purpose of this hearing is to insure that you know and understand the charge or charges that are against you. At this hearing, there will be no determination made about your guilt or innocence of the alleged offense(s), but only that you know and understand the charge or charges against you.

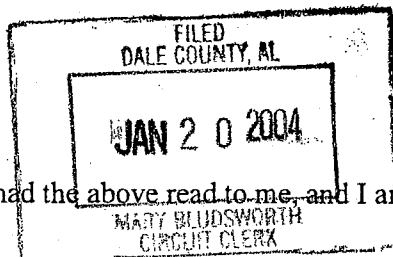
You are entitled to be represented by an attorney in these proceedings. You have a right to hire your own attorney. One purpose of this hearing is to determine if you can or cannot afford to hire an attorney; if the Court concludes that you are indigent, one will be appointed for you, if you otherwise qualify for such representation.

You have a right to talk with your attorney, family or friends, and if necessary, reasonable means will be provided in order to enable you to do so.

If you are charged with a felony, you are entitled to a Preliminary Hearing before a judge to determine whether the prosecution has sufficient evidence to establish that you probably committed the crime or crimes with which you are charged; however, you may waive, that is, give up your right to such Preliminary Hearing. Your attorney will assist you with the decision as to whether to request a Preliminary Hearing. If, at the conclusion of a Preliminary Hearing, the judge finds that sufficient evidence has been shown to establish that you probably committed the crime or crimes with which you are charged, he will then bind you over for further action of the Court, including the Grand Jury. If, on the other hand, the judge finds that the evidence is insufficient to establish that you probably committed the crime or crimes charged, then he will dismiss the charge and discharge you from further custody or pre-trial release obligations.

Another purpose of this hearing is to determine whether bail should be set in your case, or, if it has been already set, if it should remain the same, be raised, be lowered, or whether you should be released upon your own recognizance, that is, your personal promise to appear for future court proceedings, or released in the custody of some responsible person. In order for me to make this determination, it will be necessary for me to ask you some questions concerning your ties with the community. Your attorney can request a separate hearing in regard to your bail.

This, the 16 day of Jan, 2004



Judge

I have read, or have had the above read to me, and I am fully aware of all of my rights presented in this initial appearance.

cc: Defendant

Defendant

Gary Horne
416-98-3121

STATE OF ALABAMA,

Plaintiff,

vs.

GARY HORNE,

Defendant.

IN THE DISTRICT COURT OF
DALE COUNTY, ALABAMA

CRIMINAL DIVISION

DC-2004_____

TO: HONORABLE WILLIAM B. MATTHEWS, JR.

NOTICE OF APPOINTMENT
AS ATTORNEY TO REPRESENT DEFENDANT

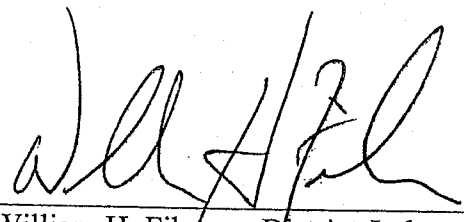
The above named Defendant has requested that the Court appoint an attorney for him in connection with these proceedings, and has executed an Affidavit of Substantial Hardship in this regard.

You have been appointed to represent the Defendant in connection with these charges, as provided by law. Please contact the Defendant as soon as possible so that your preparation of defensive matters can be started without delay.

You may, of course, feel free to contact the District Attorney or one of the Assistant District Attorneys, as appropriate, in regard to development of the defense.

If for any reason you are not in a position to represent this Defendant, please notify this Court immediately by telephone, and confirm such notice in writing. If there are any questions in this regard, please call this Court.

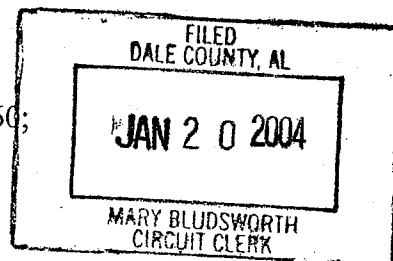
This the 16th day of January, 2004.


William H. Filmore, District Judge

CHARGE(S): Attempted Murder

ADDRESS: Lot 46, Hidden Grove Trailer Court, Ozark, AL 36360;
Currently in the Dale County Jail

cc: Attorney



0 014

STATE OF ALABAMA,
PLAINTIFF

vs.

GARY HORNE,
DEFENDANT

) IN THE DISTRICT COURT OF
) DALE COUNTY, ALABAMA
)

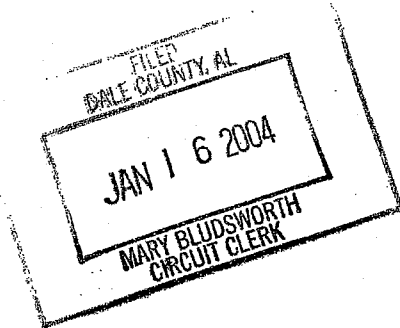
) CRIMINAL DIVISION
)

) CASE NO. DC-2004-
)

ENTRY OF APPEARANCE

COMES NOW William B. Matthews, Jr. who hereby enters his appearance as counsel for the Defendant, Gary Horne, in the above styled case.

DONE this the 16th day of Jan., 2004.



A handwritten signature in black ink, appearing to read "Will B Matthews Jr", written over a horizontal line.

William B. Matthews, Jr. (MAT016)
Attorney for Defendant
P. O. Box 1145
Ozark, AL 36361
(334) 774-8804

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served a copy of the foregoing instrument on the Honorable David Emery, District Attorney, by placing a copy of same in the U.S. Mail, postage prepaid and addressed to him at P. O. Box 1688, Ozark, AL, 36361, this 16th day of Jan., 2004.

A handwritten signature in black ink, appearing to read "Will B Matthews Jr", written over a horizontal line.

William B. Matthews, Jr.

STATE OF ALABAMA,
PLAINTIFF,

VS.

GARY HORNE,
DEFENDANT,

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IN THE DISTRICT COURT OF
DALE COUNTY, ALABAMA

CRIMINAL DIVISION

CASE NO. DC-2004-

DISCOVERY MOTION

COMES NOW the Defendant in the above-styled case and moves the Honorable Court to require the State, through the District Attorney of the 33rd Judicial Circuit, to produce at any of the non-jury hearings and prior to trial the following:

1. Copies of all police reports in connection with this case.
2. Copies of any scientific reports, if applicable.
3. Names and addresses of all witnesses.
4. Any statements made by Defendant whether oral or written to any police officer or other witness to be called by State.
5. The criminal records of all persons whom the State intends to call as a witness.
6. The criminal record of the Defendant, if any.
7. Copies of the affidavits used to procure search warrants and a copy of the actual search warrant, if applicable.
8. Any other evidence which the Prosecutor plans to use at the trial of the Defendant, if any previously asked for.

This motion is made under the authority of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, (1963); Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793 (1967); and Williams v. Dutton, 400 Fed. 2d 797 (5th Cir. 1968).

That all of said documents, pictures and articles are relevant, significant and constitute substantial material evidence and will be useful to the named Defendant as evidence upon

Defendant's trial under said case.

The aforesaid documents are in possession of the State and are favorable or arguably favorable to the Defendant as to the issue of Defendant's innocence.

That without the production of the documents referred to above and the list of witnesses which State intends to use, the Defendant's counsel will not be able to effectively represent Defendant in the above-styled case and thus Defendant will be denied the right of counsel which is guaranteed to Defendant under the provisions of Article I Section VI, of the Alabama Constitution, and the Sixth Amendment of the United States Constitution made applicable to the State through the due process clauses of the Fourteenth Amendment of the United States Constitution.

WHEREFORE, the Defendant prays:

a. That the state be required to produce all documents and other evidence referred to above as well as a list of all witnesses and people that the District Attorney, his staff, or the law enforcement agencies have interviewed in regard to this case.

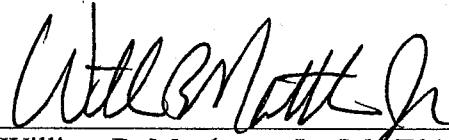
b. Without waiving Defendant's right to have Defendant's counsel examine said documents, pictures and articles, if the Court does not permit this to be done, that the Court conduct an in camera examination of said documents, pictures and articles, and Defendant's counsel be permitted to see and copy or reproduce any of said documents, pictures and articles which the Court determines to be favorable to the named Defendant as to the question of guilt or punishment or for the purpose of impeaching any of the witness to be called by the State and in the trial of the named Defendant.

c. That if any part of said documentary evidence is not made available to the named Defendant prior to the commencement of Defendant's trial, then without waiving Defendant's right to the production of said evidence prior to Defendant's trial, Defendant respectfully moves the Court for an order directing the District Attorney to produce all such documents and evidence and to submit the same to Defendant's counsel at the close of the State's evidence.

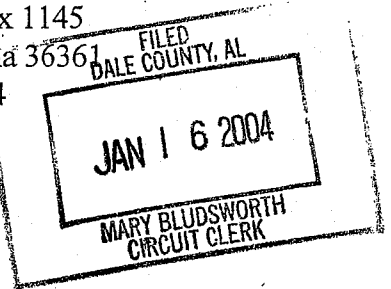
d. Without waiving the foregoing, the Defendant requests that an exact copy be made of each item which is not presented to defense counsel and that the same be sealed and included in the record of this case for the purpose of insuring effective review of the Court's denial of the Defendant's previous request for disclosure.

e. That the duty of the District Attorney to disclose pursuant to this motion be considered as continuing up until and through the trial and post judgment proceedings.

DONE this 16th day Jan., 2004.

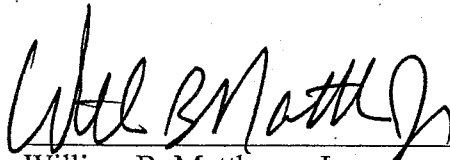


William B. Matthews, Jr. (MAT016)
Attorney for Defendant
Post Office Box 1145
Ozark, Alabama 36361
(334) 774-8804



CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have mailed a copy of the foregoing motion to the District Attorney, Mr. David Emery, Attorney for Plaintiff, by placing a copy of same in the U.S. Mail, postage prepaid and addressing it to him at P.O. Box 1688, Ozark, Alabama 36361 this 16th day of Jan., 2004.



William B. Matthews, Jr.

STATE OF ALABAMA,
PLAINTIFF,

VS.

GARY HORNE,
DEFENDANT,

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IN THE DISTRICT COURT OF
DALE COUNTY, ALABAMA

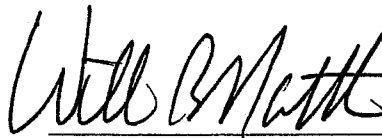
CRIMINAL DIVISION

CASE NO. DC-2004-

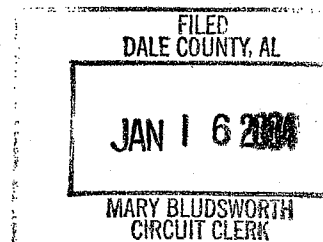
MOTION FOR PRELIMINARY HEARING

COMES NOW the Defendant, Gary Horne, by and through his undersigned Attorney, William B. Matthews, Jr., who files this motion for preliminary hearing.

DONE this 16th day of Jan., 2004.

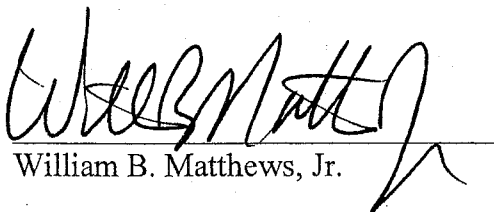


William B. Matthews, Jr. (MAT016)
Attorney for Defendant
Post Office Box 1145
Ozark, Alabama 36361
(334) 774-8804



CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have mailed a copy of the foregoing motion to the District Attorney, Mr. David Emery, counsel for Plaintiff, by placing a copy of same in the U.S. Mail, postage prepaid and addressing it to him at P.O. Box 1688, Ozark, Alabama 36361 this 16th day of Jan., 2004.



William B. Matthews, Jr.

IN THE DISTRICT COURT OF DALE COUNTY, ALABAMA

CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

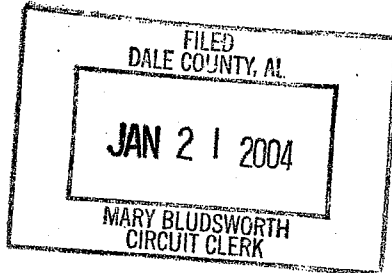
GARY HORNE,
Defendant.

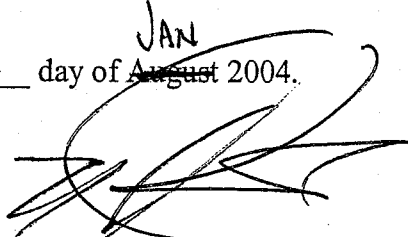
CASE NO.: DC- 03 -

NOTICE OF APPEARANCE

COMES NOW, N. Tracy Nickson and makes this his Notice of Appearance on behalf the Defendant, GARY HORNE.

RESPECTFULLY submitted on this the 21 day of ^{JAN}~~August~~ 2004.




N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his/her box and or by first class U.S. Mail, postage pre-paid on this the 21st of January 2004.


OF COUNSEL

IN THE DISTRICT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

CASE NO.: DC- 03 -

REQUEST FOR DISCOVERY

COMES NOW, the Defendant, by and through his attorney N. Tracy Nickson, and moves this Court, pursuant to the Due Process clause of the Fifth and Fourteenth Amendment to the United States Constitution and the Alabama State Constitution and the Alabama Rules of Criminal Procedure, for an order to the District Attorney to produce and make available to the Defendant and his attorney for the purpose of inspection, copying and / or testing the following:

1. All information from whatever source or in whatever forms which may be exculpatory in nature or which may lead to evidence, which tends to be exculpatory in nature. See Brady v. Maryland, 373 U.S. 83.
2. All Statements made by Defendant to anyone, including law enforcement officials, whether statements are recorded (tape video), written or in memoranda form of any oral statement of Defendant.
3. A transcript of the arrest and conviction record, if any, of the Defendant.
4. Any and all information which, in any way, tends to adversely affect the creditability of all witness (es) the prosecution intends to call on its behalf at trial or any hearing in this case.

5. All items of physical evidence, which the prosecution expects to use as evidence in this case, such items to be produced for examination and testing.
6. Any and all materials required to be produced by the prosecution pursuant to the precedent set forth in Giglio v. United States, 405 U.S. 150,; Naque v. Illinois, 360 U.S. 264; United States v. Tashman, 478 FR.2d 129 (5 Cir. 1973.)
7. Any and all tape recordings, videotapes, wire tap information, pen register information, or any other electronic evidence, which may exist concerning this case or any related case.
8. All information, which is discoverable pursuant to the provisions of Rule 16. *Alabama Rules of Criminal Procedure*.
9. Defendant requests this Court to Order the prosecution to provide early access to any information, which constitutes "Jenkins Act" (18 U.S.C. Sec. 3500) material.
10. Any and all tape recordings and stenographic transcription of admissions, confessions and statements of Defendant at any time or place to any federal, state, city or county law enforcement officer or agent, or to anyone acting in an official capacity.
11. Any and all tangible objects, currency, weapons, books, papers and documents obtained from any other person's relating to the charges against the Defendant.
12. The results and reports of any scientific or other tests, analysis, experiments or studies made in connection with the instant case, including but not limited to any and all results of fingerprints compared, blood tests taken, hair samples compared, and medical reports of whatever nature.
13. The results and reports of any and all sobriety tests conducted by any law enforcement officer.

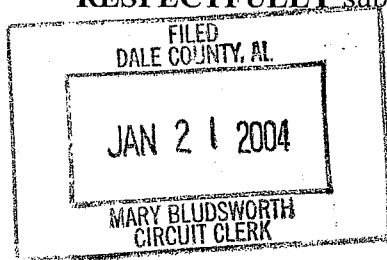
14. Copies of any witness statements or summaries of any oral statement, whether or not reduced to writing, made by any person(s) in connection with the instant case.
15. A list of all persons interviewed, whether or not reduced to writing by any person in connection with the investigation of the instant case.
16. A list of all persons, their names, addresses and telephone numbers (both residential and employment) that the prosecution expects to call or may call to testify in connection with this case.
17. Copies of all incident reports, arrest reports, supplemental reports or any report whether official or unofficial, made by any law enforcement agent in connection with the instant case.
18. A list of all documents currently in the possession of the District Attorney's office or any other State agency used in the investigation of this case or expected to be used as evidence in this case.
19. A list of all items collected as possible evidence in this case and a list of items to be tested, scientifically or otherwise in connection with the instant case.
20. Permission to inspect any and all physical items, photographs or physical places contemplated of use in connection with the instant case, including but not limited to inspection of the scene at any location connected with the arrest of the Defendant for then commission of the alleged crime.
21. Copies of all photographs, diagrams or charts taken in connection with this case.
22. The pretrial discovery requested in the foregoing Motion is essential to insure the accused his or her right to a fair hearing, his right to confrontation, his right to prepare a defense in

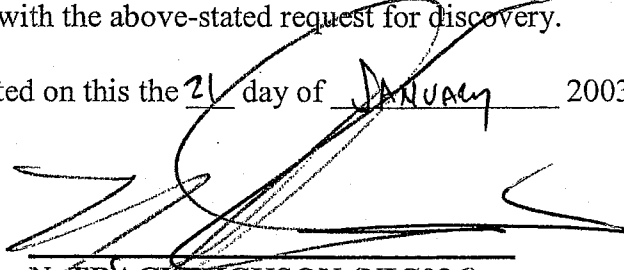
his own behalf, and his right to effective counsel and due process of law and all other rights not herein enumerated.

23. Defendant requests that the Government be required to produce all the foregoing items to this Honorable Court for an in-camera inspection in order to allow the Court to make a determination concerning the validity of any objection the Government may have to the production of the foregoing items.
24. Any and all intelligence reports that are created from any and all law enforcement agencies within this State or any other State or federal government.
25. Original or copies of any and all notices of appearance served upon each and every witness, including return of service of each said notice in the instant case.
26. Any and all probable cause reports, statement, search warrants and any and all statements to which an impartial magistrate or Judicial Officer issued any search warrant in the instant case, including but not limited to, arrest report and or indictment, date indicted and date notice was served upon the Defendant.
27. Copies of all ballistics test results.

WHEREFORE THE PREMISES CONSIDERED, the Defendant prays that this Court shall set forth an order that is consistent with the above-stated request for discovery.

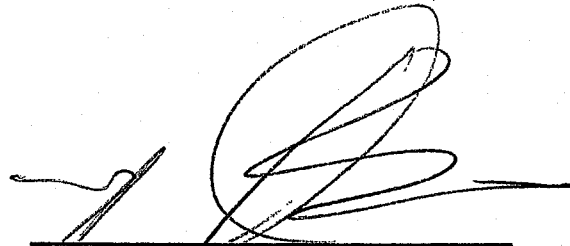
RESPECTFULLY submitted on this the 21 day of JANUARY 2003.




N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his/her box and or by first class U.S. Mail, postage pre-paid on this the 21st of January 2003.



OF COUNSEL

IN THE DISTRICT COURT OF DALE COUNTY, ALABAMA

CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

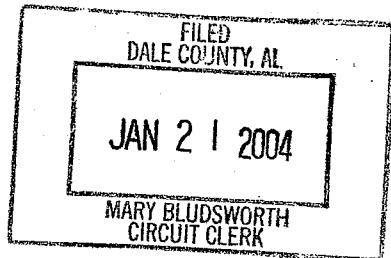
GARY HORNE,
Defendant.

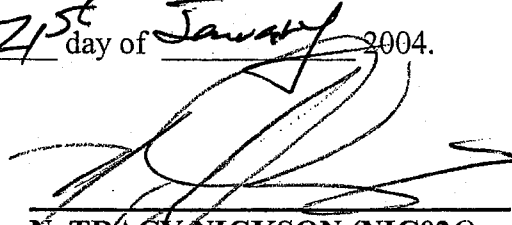
CASE NO.: DC- 03 -

MOTION TO SET BOND

COMES NOW, the Defendant in the above styled action, and respectfully requests that this Honorable Court will schedule a hearing after which bond may be set in said action.

RESPECTFULLY submitted on this the 21st day of January 2004.




N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his/her box and or by first class U.S. Mail, postage pre-paid on this the 21st of January 2004.


OF COUNSEL

STATE OF ALABAMA,
PLAINTIFF

vs.

GARY HORNE,
DEFENDANT

) IN THE DISTRICT COURT OF
) DALE COUNTY, ALABAMA
)

) CRIMINAL DIVISION
)

) CASE NO. DC-2004-
)

MOTION TO SET BAIL

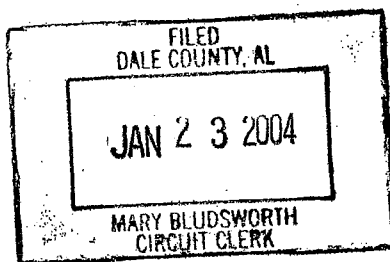
COMES NOW the Defendant, Gary Horne, by and through his undersigned Attorney, William B. Matthews, Jr., who moves the Honorable Court to set bail in the above styled case and shows the Court the following:

1. The Defendant is being held without bail.
2. That the Defendant is presently charged with a Class B felony and the recommended bond range is from \$2,000 to \$20,000.

WHEREFORE, the premises considered, the Defendant prays for the following relief:

1. An order setting bail within the recommended range according to Rule 7.2 of the Alabama Rules of Criminal Procedure.

DONE this the 23rd day of Jan, 2004.



William B. Matthews, Jr. (MAT016)
Attorney at Law
P. O. Box 1145
Ozark, AL 36361
(334) 774-8804

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served a copy of the foregoing instrument on the Honorable David Emery, District Attorney, by placing a copy of same in the U.S. Mail, postage prepaid and addressed to him at P. O. Box 1688, Ozark, AL, 36361, this 23rd day of Jan, 2004.

William B. Matthews, Jr.

STATE OF ALABAMA,
PLAINTIFF

vs.

GARY HORNE,
DEFENDANT

) IN THE DISTRICT COURT OF
) DALE COUNTY, ALABAMA
)

) CRIMINAL DIVISION
)

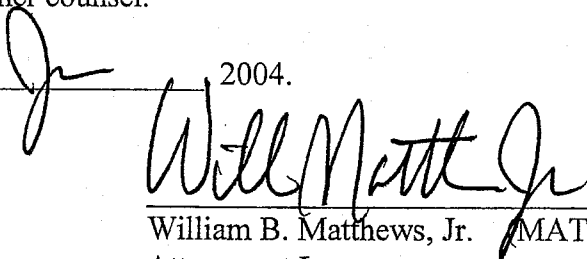
) CASE NO. DC-2004-
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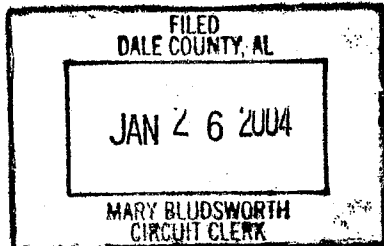
MOTION TO WITHDRAW

COMES NOW William B. Matthews, Jr., who moves the Honorable Court to allow him to withdraw as counsel for the Defendant, Gary Horne, the above styled case and shows the Court the following:

1. The Defendant has retained other counsel.

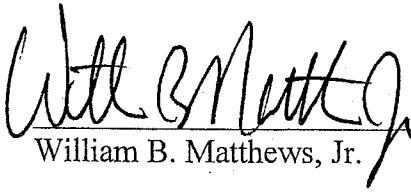
DONE this the 26 day of Jan, 2004.


William B. Matthews, Jr. (MAT016)
Attorney at Law
P. O. Box 1145
Ozark, AL 36361
(334) 774-8804



CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served a copy of the foregoing instrument on the Honorable David Emery, District Attorney, by placing a copy of same in the U.S. Mail, postage prepaid and addressed to him at P. O. Box 1688, Ozark, AL, 36361, this 26 day of Jan, 2004.


William B. Matthews, Jr.

STATE OF ALABAMA,

Plaintiff,

VS.

GARY HORNE,

Defendant.

**IN THE DISTRICT COURT OF
DALE COUNTY, ALABAMA**

CRIMINAL DIVISION

CASE NO. DC-2004-89


ORDER

The Attorney for the Defendant, William B. Matthews, Jr., having made a motion to withdraw in open Court as the Defendant has hired N. Tracy Nickson, to represent him in this matter, the Court having considered same, it is hereby,

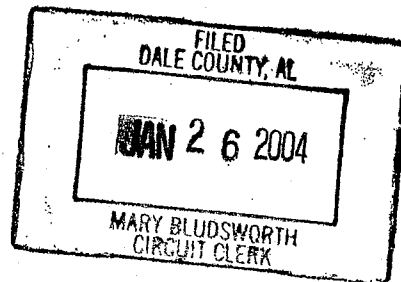
ORDERED, ADJUDGED and DECREED that the Attorney for the Defendant is permitted to withdraw from the case.

DONE this the 26th day of January, 2004.

1/26/04


William H. Filmore, District Judge

cc: ~~/~~ Honorable William B. Matthews, Jr.
~~/~~ Honorable David C. Emery
~~/~~ Honorable N. Tracy Nickson



STATE OF ALABAMA,	)	IN THE DISTRICT COURT OF
	)	DALE COUNTY, ALABAMA
Plaintiff,)	
)	
vs.	)	CRIMINAL DIVISION
)	
GARY HORNE,)	
)	
Defendant.	)	CASE NO. DC-2004-89

DISCOVERY ORDER

IT IS HEREBY ORDERED:

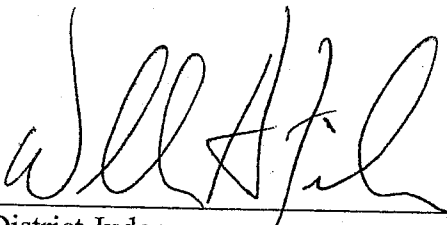
1. The District Attorney shall produce or make available to the defendant's attorney the following:

- a. A copy of the Indictment against the Defendant;
- b. All statements of the Defendant, which are reduced in writing;
- c. All statements of the Defendant which are electronically recorded or taped, and any transcript thereof;
- d. The substance of any oral statements made by the Defendant which are not included within (b) and (c) hereof, or if the District Attorney knows of any statements or spontaneous remarks made by the Defendant while in the custody of the police or during the investigation.
- e. Any and all evidence tending to exculpate the guilt of the Defendant;
- f. The results of any scientific or expert tests, experiments, or examinations to be used by the prosecution at the trial;
- g. All physical evidence or documentary evidence which the prosecution will offer into evidence in its case in chief, including any search warrant and search affidavits upon which the prosecution will rely on its case in chief;
- h. All physical evidence or documentary evidence seized from the Defendant by law enforcement officers, whether or not the same will be offered into evidence at trial;
- i. In prosecutions under the Alabama Uniform Control Substance Act, the defendant may procure the examination and testing of controlled substance or other prosecution evidence by his own expert, upon request to the District Attorney or his assistants. Such examination and testing shall only take place in the presence of the District

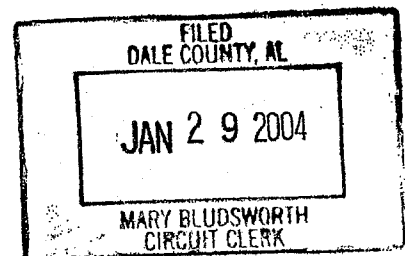
Attorney or his authorized representative, and the same shall be done at the defendant's expense;

- j. The name and last known address of all confidential government informants who are eyewitnesses to the commission of the crime charged in the indictment, if the defendant doesn't already have such information.
2. In all instances where physical or documentary evidence, tape recordings and the like are to be inspected, examined or copied by the defense counsel, the parties shall insure that such procedures are used as will safeguard and maintain the integrity of said evidence
3. The District Attorney is under an obligation to disclose to defense counsel any evidence subject to this Order, which he subsequently discovers to exist, and do so within a reasonable time after its existence is discovered.
4. Any disagreements with the parties concerning the scope, identity or existence of discoverable matter are to be submitted to the Court for resolution upon written motion of either party within a reasonable time before trial. Any party who does not so submit any unresolved discovery issue to the court will be precluded from raising the same at trial. If the court finds that either party has failed to use good faith in complying with this Order, the court may, in the case of the State, bar the State from using at trial any non-disclosed matter; and the Court may, in the case of the defendant, hold the objections to the State's use of said matter at trial, based upon non-disclosure, to be waived.

This the 29th day of January, 2004.


District Judge

cc: Honorable David C. Emery
Honorable N. Tracy Nickson



State of Alabama Unified Judicial System Form CR-10 Rev. 8/98	CONSOLIDATED APPEARANCE BOND (District Court, Grand Jury, Circuit Court)	Case Number
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IN THE Circuit COURT OF DALE, ALABAMA
 (Circuit or District) (Name of County)

STATE OF ALABAMA v. GARY HARRIS
 Defendant

I, GARY HARRIS (Defendant), as principal,
 and I (we), DALE BOND CO.
 (Please print)

as surety(ies), agree to pay the State of Alabama the sum of \$ 30,000.00 and such costs as authorized by law unless the above-named defendant appears before the district court of the county on NEXT TUE (date) at 9:00 A.M. (time) (if date and time are unknown, the words "the scheduled" may be placed in the date blank and a line may be placed in the space for time) and from time to time thereafter until discharged by law or at the next session of circuit court of the county; there to await the action by the grand jury and from session to session thereafter until discharged by law to answer to the charge of ATTEMPTED MURDER, or any other charge as authorized by law.

We hereby severally certify that we have property valued over and above all debts and liabilities that has a fair market value equal to or greater than the amount of the above bond, and we, and each of us, waive the benefit of all laws exempting property from levy and sale under execution or other process for the collection of debt by the constitution and laws of the State of Alabama, and we especially waive our rights to claim as exempt our wages or salary that we have under the laws of Alabama, and our rights to homestead exemption that we have under the Constitution of Alabama and the laws of the State of Alabama, as set out in a separate writing.

It is agreed and understood that this is a consolidated bond, eliminating the necessity for multiple bonds and that it shall continue in full force and effect, until the defendant appears before the district court or circuit court, whichever has jurisdiction, to answer the above charge, and from time to time thereafter until the defendant is discharged by law, or, until such time as the undersigned sureties are otherwise duly exonerated as provided by law.

Signed and sealed this date with notice that false statements are punishable as perjury.

Signature of Defendant <u>GARY HARRIS</u> (L.S.)			
Address (print) <u>LOT 46 HIDDEN GROVE TR PK</u>		City <u>OWEN</u>	State <u>AL</u>
Zip <u>36360</u>			

Signature of Surety/Agent of Professional Surety or Bail Company <u>DALE BOND CO.</u> (L.S.)		Signature of Surety/Agent of Professional Surety or Bail Company <u>DALE BOND CO.</u> (L.S.)	
Social Security Number <u>DALE BOND CO.</u>	Telephone Number <u>790-0399</u>	Social Security Number	Telephone Number
Address (print)	City State Zip	Address (print)	City State Zip

Signature of Surety/Agent of Professional Surety or Bail Company <u>DALE BOND CO.</u> (L.S.)		Signature of Surety/Agent of Professional Surety or Bail Company <u>DALE BOND CO.</u> (L.S.)	
Social Security Number	Telephone Number	Social Security Number	Telephone Number
Address (print)	City State Zip	Address (print)	City State Zip

FILED
 DALE COUNTY, AL
 FEB - 2 2004
 Approved by: Judge/Magistrate/Sheriff
MARY BLUDSWORTH
 By: Deputy Sheriff
DALE BOND CO.

Date 1-30-2004

Defendant's Information					
Date of Birth <u>10-16-72</u>	Sex <u>M</u>	Height <u>6'</u>	Weight <u>180</u>	Employer	
Social Security Number <u>416-98-3121</u>	Race <u>BLK</u>	Hair <u>BLK</u>	Eyes <u>BRN</u>	Employer's Address	
Driver's License Number <u>6301217</u>	State <u>AL</u>	Telephone Number <u>445-4402</u>	Employer's Telephone Number		

INDICTMENT # 28

THE STATE OF ALABAMA

CIRCUIT COURT

DALE COUNTY

MARCH 2, TERM 2004

THE GRAND JURY OF SAID COUNTY CHARGE THAT BEFORE THE FINDING OF THIS
INDICTMENT,

ON OR ABOUT JANUARY 15, 2004, ONE GARY HORNE DID, WITH THE INTENT TO COMMIT THE CRIME OF MURDER OF TO-WIT: JOHN WILLIAMS, IN VIOLATION OF SECTION 13A-6-2 OF THE CODE OF ALABAMA, ATTEMPT TO COMMIT SAID OFFENSE BY SHOOTING HIM WITH A HANDGUN, IN VIOLATION OF SECTION 13A-4-2 OF THE CODE OF ALABAMA,

AGAINST THE PEACE AND DIGNITY OF THE STATE OF ALABAMA.

DISTRICT ATTORNEY OF THE 33RD JUDICIAL CIRCUIT

A TRUE BILL

INDICTMENT # 28

Charles Hubbard
FOREMAN OF THE GRAND JURY

THE STATE OF ALABAMA
DALE COUNTY

PRESENTED TO THE COURT BY THE GRAND JURY IN THE PRESENCE OF

15 OTHER JURORS.

FILED

FILED
DALE COUNTY, AL
MAR - 3 2004
MARY BLUDSWORTH
CIRCUIT CLERK

CIRCUIT COURT

THE STATE

VS

GARY HORNE

WRIT OF ARREST ORDERED AND
AMOUNT OF BAIL TO BE REQUIRED OF THE
DEFENDANT

BOND: \$30,000.00

Michael T. Williams
JUDGE

CHARGES

ATTEMPTED MURDER

INDICTMENT

PROSECUTOR

STATE WITNESSES

REX TIPTON
KEITH CAUTHEN
MARTIN SPEARS

I, _____

CLERK OF THE CIRCUIT COURT OF
DALE COUNTY ALABAMA, HEREBY
CERTIFY THAT THIS IS A TRUE AND
CORRECT COPY OF THE ORIGINAL
INDICTMENT WITH ALL THE
ENDORSEMENTS THEREON, IN CASE OF
THE CASE OF ALABAMA AGAINST

GARY HORNE

THIS _____ DAY OF

MARCH 2004.

CLERK OF THE CIRCUIT COURT OF
DALE COUNTY ALABAMA

State of Alabama Unified Judicial System Form CR-9 Rev. 3/95	PLEA OF NOT GUILTY AND WAIVER OF ARRAIGNMENT	Case Number CC-04-1220
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IN THE _____ CIRCUIT COURT OF _____ DALE COUNTY, ALABAMA
 (Circuit, District or Municipal) (Name of County or Municipality)

☒ STATE OF ALABAMA v. _____ GARY HORNE, Defendant

Comes now, the defendant in the above-styled matter, and to the offense charged enters a plea of

☒ Not Guilty
☐ Not Guilty by Reason of Mental Disease or Defect
☐ Not Guilty and Not Guilty by Reason of Mental Disease or Defect

Defendant acknowledges receipt of the copy of the charge against him/her and further waives the right to have an arraignment at which the defendant is present in person, or at which the defendant is represented by an attorney.

But, the defendant specifically and expressly reserves the right upon the filing hereof to hereafter, but before trial or before such date as may be set by the court, to interpose any defenses, objections, or motions which the defendant had the right as a matter of law or rule to interpose in this cause, prior to the filing hereof.

Defendant's date of birth is 16 October 1972 Defendant's age is 31 years

The defendant is not eligible for consideration by the court for youthful offender status as provided by law.

3/26/2004
 Date
3/26/2004
 Date

[Signature]
 Defendant
[Signature]
 Attorney for Defendant

This is to certify that I am the attorney for the defendant in this matter, and that I have fully explained this form and all matters set forth herein, and pertaining hereto, to the defendant. I further state to the court that I have explained to the defendant his right to be arraigned in person and his right to have me represent him at arraignment. I further certify to the court that my client hereby knowingly, voluntarily, and intelligently waives these rights after a full and complete explanation of each and every one of them to him/her by me. BOTH MYSELF AND THE DEFENDANT UNDERSTAND THAT I AM RESPONSIBLE FOR ASCERTAINING WHAT DATE, IF ANY, HAS BEEN SET BY THE COURT FOR THE MAKING OR FILING OF ANY DEFENSES, OBJECTIONS, OR MOTIONS. I FURTHER UNDERSTAND THAT I AM RESPONSIBLE FOR NOTIFYING MY CLIENT OF THE DATE HIS/HER CASE IS SET FOR TRIAL, AND THAT I HAVE ADVISED AND INFORMED HIM/HER THAT IN THE EVENT HE/SHE FAILS TO APPEAR ON THE DATE HIS/HER CASE IS SET FOR TRIAL, ALL APPROPRIATE LEGAL ACTION WILL BE TAKEN BY THE COURT AGAINST THE DEFENDANT AND HIS/HER BOND. I further certify to the court that I have advised my client that he/she is responsible for obtaining the date his/her case is set for trial in this matter and that in the event he/she fails to appear on the date his/her case is set for trial all appropriate legal action will be taken by the court against the defendant and his/her bond, and I hereby certify that the defendant knows that he/she is personally responsible for obtaining the date his/her case is set for trial and for being present in court on that date.

3/26/2004
 Date
[Signature]
 Attorney for Defendant Signature

I certify that I served a copy of the foregoing plea and waiver of arraignment on the Prosecutor by mailing/delivering a copy of the same to him/her on:
3/26/2004
 Date

N. TRACY NICKSON (NIC-026)
 Printed or Typed Attorney's Name
2181 AA COBBS FORD ROAD, PRATTVILLE AL 36066
 Address

This is to certify that my attorney has explained each and every matter and right set forth in this form and I have completely and fully read and do so understand each and every matter set forth in this form. I further state to the court that I do not wish to be personally present at an arraignment in this case and that I do not want to have an attorney represent me at an arraignment and WITH FULL KNOWLEDGE OF EACH OF THESE RIGHTS, I HEREBY EXPRESSLY WAIVE SUCH RIGHTS. I further state to the court that I have been informed of the charge against me and have received a copy of the charge.

3/26/2004
 Date
 Filed in office this date

MAR 26 2004
 MARY BLUDSWORTH
 CIRCUIT CLERK

[Signature]
 Defendant Signature
Mary Bludsworth By ds
 Clerk

M

))

**IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION**

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

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)
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CASE NO.: CC-04-1220

REQUEST FOR DISCOVERY

COMES NOW, the Defendant, by and thorough his attorney N. Tracy Nickson, and moves this Court, pursuant to the Due Process clause of the Fifth and Fourteenth Amendment to the United States Constitution and the Alabama State Constitution and the Alabama Rules of Criminal Procedure, for an order to the District Attorney to produce and make available to the Defendant and his attorney for the purpose of inspection, copying and / or testing the following:

1. All information from whatever source or in whatever forms which may be exculpatory in nature or which may lead to evidence, which tends to be exculpatory in nature. See Brady v. Maryland, 373 U.S. 83.
2. All Statements made by Defendant to anyone, including law enforcement officials, whether statements are recorded (tape video), written or in memoranda form of any oral statement of Defendant.
3. A transcript of the arrest and conviction record, if any, of the Defendant.
4. Any and all information which, in any way, tends to adversely affect the creditability of all witness (es) the prosecution intends to call on its behalf at trial or any hearing in this case.

5. All items of physical evidence, which the prosecution expects to use as evidence in this case, such items to be produced for examination and testing.
6. Any and all materials required to be produced by the prosecution pursuant to the precedent set forth in Giglio v. United States, 405 U.S. 150,; Naque v. Illinois, 360 U.S. 264; United States v. Tashman, 478 FR.2d 129 (5 Cir. 1973.)
7. Any and all tape recordings, videotapes, wire tap information, pen register information, or any other electronic evidence, which may exist concerning this case or any related case.
8. All information, which is discoverable pursuant to the provisions of Rule 16. *Alabama Rules of Criminal Procedure*.
9. Defendant requests this Court to Order the prosecution to provide early access to any information, which constitutes "Jenkins Act" (18 U.S.C. Sec. 3500) material.
10. Any and all tape recordings and stenographic transcription of admissions, confessions and statements of Defendant at any time or place to any federal, state, city or county law enforcement officer or agent, or to anyone acting in an official capacity.
11. Any and all tangible objects, currency, weapons, books, papers and documents obtained from any other person's relating to the charges against the Defendant.
12. The results and reports of any scientific or other tests, analysis, experiments or studies made in connection with the instant case, including but not limited to any and all results of fingerprints compared, blood tests taken, hair samples compared, and medical reports of whatever nature.
13. The results and reports of any and all sobriety tests conducted by any law enforcement officer.

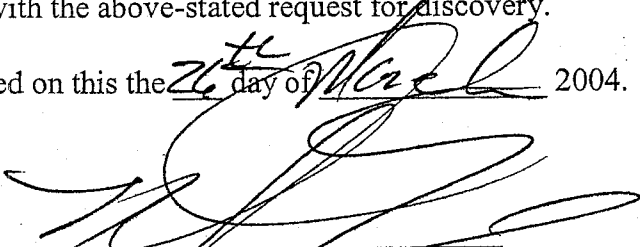
14. Copies of any witness statements or summaries of any oral statement, whether or not reduced to writing, made by any person(s) in connection with the instant case.
15. A list of all persons interviewed, whether or not reduced to writing by any person in connection with the investigation of the instant case.
16. A list of all persons, their names, addresses and telephone numbers (both residential and employment) that the prosecution expects to call or may call to testify in connection with this case.
17. Copies of all incident reports, arrest reports, supplemental reports or any report whether official or unofficial, made by any law enforcement agent in connection with the instant case.
18. A list of all documents currently in the possession of the District Attorney's office or any other State agency used in the investigation of this case or expected to be used as evidence in this case.
19. A list of all items collected as possible evidence in this case and a list of items to be tested, scientifically or otherwise in connection with the instant case.
20. Permission to inspect any and all physical items, photographs or physical places contemplated of use in connection with the instant case, including but not limited to inspection of the scene at any location connected with the arrest of the Defendant for then commission of the alleged crime.
21. Copies of all photographs, diagrams or charts taken in connection with this case.
22. The pretrial discovery requested in the foregoing Motion is essential to insure the accused his or her right to a fair hearing, his right to confrontation, his right to prepare a defense in

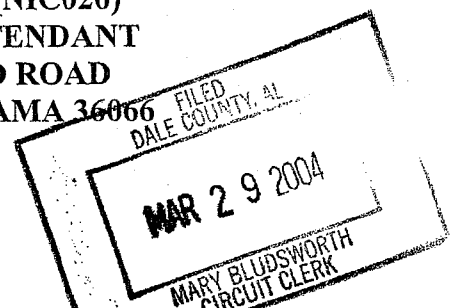
his own behalf, and his right to effective counsel and due process of law and all other rights not herein enumerated.

23. Defendant requests that the Government be required to produce all the foregoing items to this Honorable Court for an in-camera inspection in order to allow the Court to make a determination concerning the validity of any objection the Government may have to the production of the foregoing items.
24. Any and all intelligence reports that are created from any and all law enforcement agencies within this State or any other State or federal government.
25. Original or copies of any and all notices of appearance served upon each and every witness, including return of service of each said notice in the instant case.
26. Any and all probable cause reports, statement, search warrants and any and all statements to which an impartial magistrate or Judicial Officer issued any search warrant in the instant case, including but not limited to, arrest report and or indictment, date indicted and date notice was served upon the Defendant.
27. *Copies of all ballistics test results, to include the results which determined the caliber of the bullet used and it location at the scene.*

WHEREFORE THE PREMISES CONSIDERED, the Defendant prays that this Court shall set forth an order that is consistent with the above-stated request for discovery.


RESPECTFULLY submitted on this the 26th day of March 2004.


N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776



CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his/her box and or by first class U.S. Mail, postage pre-paid on this the 26th of March 2004.



OF COUNSEL

IN THE 33RD JUDICIAL CIRCUIT
DALE COUNTY, ALABAMA

STATE OF ALABAMA,	]	CRIMINAL DIVISION
PLAINTIFF,]	
GARY HORNE,	]	CASE No. CC-2004-1220
DEFENDANT.]	

DISCOVERY ORDER

IT IS HEREBY ORDERED:

1. The District Attorney shall produce or make available to the defendant's attorney the following:

- a. a copy of the Indictment against the defendant;
- b. all statements of the defendant which are reduced in writing.
- c. all statements of the defendant which are electronically recorded or taped, and any transcript thereof;
- d. the substance of any oral statements made by the defendant which are not included within (b) and (c) hereof, or if the District Attorney knows of any statements or spontaneous remarks made while the defendant is in the custody of the police or during the investigation.
- e. any and all evidence tending to exculpate the guilt of the defendant;
- f. the results of any scientific or expert tests, experiments, or examinations to be used by the prosecution at the trial;
- g. all physical evidence or documentary evidence which the prosecution will offer into evidence in its case in chief, including any search warrant and search affidavits upon which the prosecution will rely on its case in chief;
- h. all physical evidence or documentary seized from the defendant by law enforcement officers, whether or not the same will be offered into evidence at trial;

Page 2 - Discovery Order

i. in prosecutions under the Alabama Uniform Control Substance Act, the defendant may procure the examination and testing of controlled substance or other prosecution evidence by his own expert, upon request to the District Attorney or his assistants. Such examination and testing shall only take place in the presence of the District Attorney or his authorized representative, and the same shall be done at the defendant's expense;

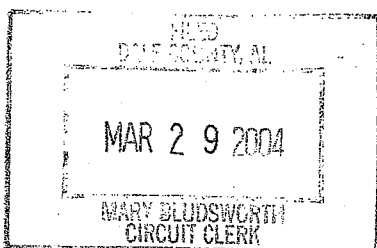
j. the name and last known address of all confidential government informants who are eyewitnesses to the commission of the crime charged in the indictment, if the defendant doesn't already have such information.

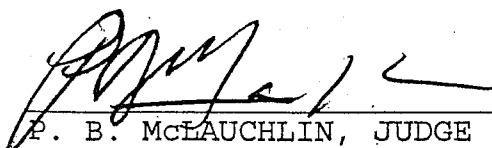
2. In all instances where physical or documentary evidence, tape recordings and the like are to be inspected, examined or copied by the defense counsel, the parties shall insure that such procedures are used as will safeguard and maintain the integrity of said evidence.

3. The District Attorney is under an obligation to disclose to defense counsel any evidence subject to this Order which he subsequently discovers to exist, and do so within a reasonable time after its existence is discovered.

4. Any disagreements with the parties concerning the scope, identify or existence of discoverable matter are to be submitted to the Court for resolution upon written motion of either party within a reasonable time before trial. Any party who does not so submit any unresolved discovery issue to the Court will be precluded from raising the same at trial. If the Court finds that either party has failed to use good faith in complying with this Order, the Court may, in the case of the State, bar the State from using at trial any non-disclosed matter; and the Court may, in the case of the defendant, hold the objections to the State's use of said matter at trial, based upon non-disclosure, to be waived.

ORDERED, this the 29th day of March, 2004.




P. B. McLAUCHLIN, JUDGE
33RD JUDICIAL CIRCUIT
DALE COUNTY, ALABAMA

IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

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CASE NO.: CC- 2004 - 122

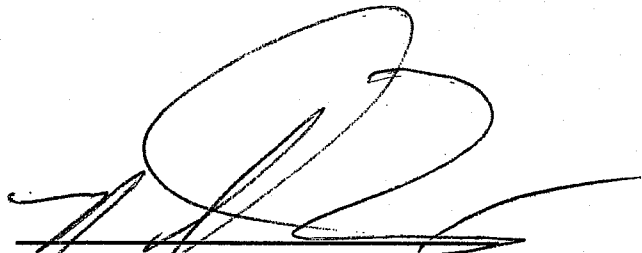
MOTION FOR CONTINUANCE

COMES NOW, the Defendant in the above styled action, by and through the undersigned counsel, and respectfully requests that this Honorable Court will grant unto him a Continuance in trial of the above-styled action; as grounds he states as follows:

1. Trial is currently scheduled in the action for 18 May 2004 at 8:30 a.m.
2. Counsel for Defendant has learned of potentially exculpatory evidence existing and being held as evidence in another action in Dale County District Court; this evidence is described more fully in a Motion to Preserve Evidence filed by the undersigned in District Court, a copy of which is attached to this Motion.
3. Further, the undersigned still awaits the production of evidence gathered at the scene of the alleged crime in the above styled action, evidence which is referred to within the Incident Report filed by law enforcement authorities but which, for whatever reason, now seems unable to be located or produced, despite specific requests by the undersigned counsel.
4. Trial of this action while crucially important evidentiary issues remain unresolved would greatly prejudice the Defendant.

WHEREFORE, these premises considered, the undersigned respectfully requests a continuance in the above styled action until such time as the evidentiary issues may be resolved.

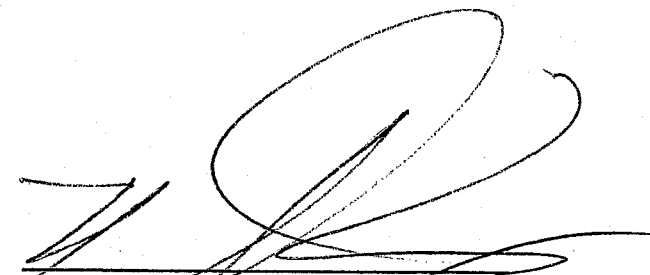
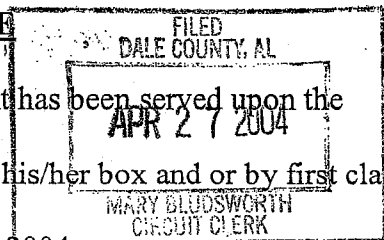
RESPECTFULLY submitted on this the 26th day of April, 2004.



**N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776**

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his/her box and or by first class U.S. Mail, postage pre-paid on this the 26th of April 2004.



OF COUNSEL

IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

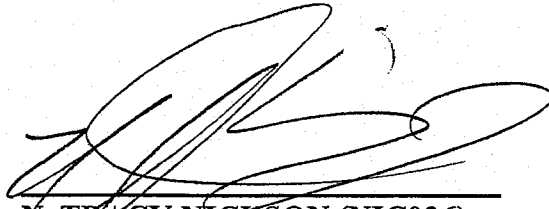
CASE NO.: CC-04-1220

MOTION TO COMPEL

Comes now, the Defendant in the above-styled action, and, pursuant to Rule 16, Alabama Rules of Criminal Procedure, respectfully requests that this Honorable Court will enter an Order compelling the State to provide evidence gathered to the Defendant; as grounds he avers as follows:

1. The State has in its custody evidence gathered at the scene of the alleged crime.
2. There is a strong probability that this evidence is exculpatory as to the Defendant.
3. The Defendant is entitled to inspect this evidence pursuant to the holdings in *Brady v. Maryland*, 373 U.S. 83, *Giglio v. United States*, 405 U.S. 150; *Naque v. Illinois*, 360 U.S. 264; and *United States v. Tashman*, 478 FR.2d 129 (5 Cir. 1973.)
4. The Defendant has specifically requested that this evidence be made available in his earlier "Request for Discovery," which request was Granted by this Honorable Court on 29 March 2004.

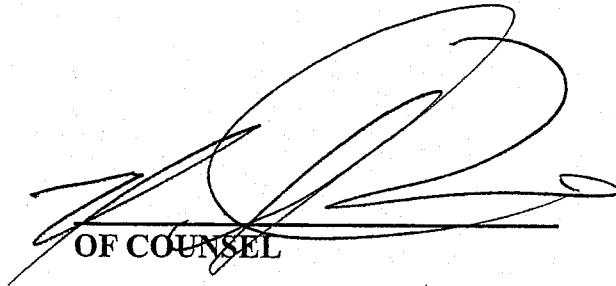
Wherefore, these premises considered, the Defendant respectfully requests that this Honorable Court will enter an Order compelling the State to provide evidence gathered to the Defendant



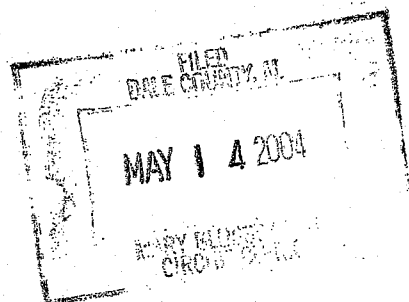
**N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776**

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his/her box and or by first class U.S. Mail, postage pre-paid on this the 12th of May 2004.



OF COUNSEL



IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

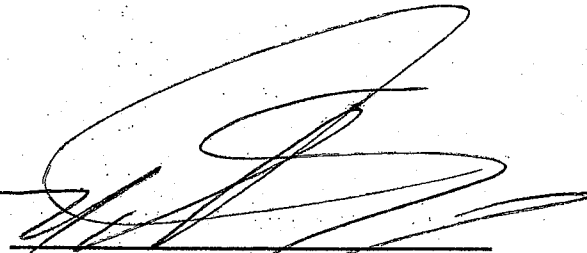
CASE NO.: CC-04-1220

NOTICE OF POTENTIAL CONFLICT

Comes now, the undersigned counsel for Defendant in the above-styled action, and respectfully offers notice to this Honorable Court of a potential prior conflict; he further states as follows:

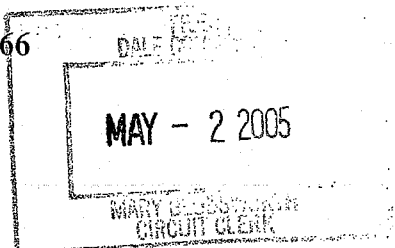
1. Trial of this action is set for 16 May 2005.
2. The undersigned is currently scheduled to appear at trial in Montgomery County Circuit Court in Case No. CC-05-405; a copy of this trial notice is attached hereto.
3. Absent the resolution of either of these matters prior to 16 May 2005, the undersigned may be forced to request a continuance in the above styled matter, which is the most recently set hearing.

Respectfully submitted this the 30th day April, 2005.



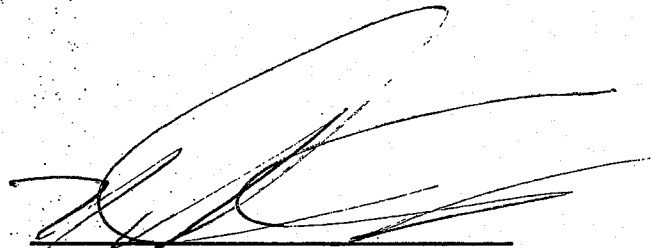
N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

5/1/05
Rec'd - PM
cy. Nickson



CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his box and/or by first class U.S. Mail, postage pre-paid on this the 30th day April, 2005



OF COUNSEL

THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA)

V.)

CASE NO. CC-05-405-S

ALTON D. ARRINGTON)

ORDER

TRIAL DATE

The above case is set for trial on May 16, 2005, at 9:00 a.m. in Courtroom 3-C, Montgomery County Courthouse.

STATUS CONFERENCE

Status conference is set for May 12, 2005, at 9:30 a.m. Defendant is ordered to be present at this conference.

DISCOVERY

State and the Defendant shall at a convenient time and place disclose, produce for inspection and copying and exchange all items and things set out in Rule 16, A.R. Crim.P., and the State shall also disclose all Rule 404(b), Ala.R.Evid., matters it intends to use at trial. At the same time, the State shall disclose all evidence generally required by Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 97 (1976); and United States v. Bagley, 473 U.S. ___, 105 S. Ct. 3375 (1975). The State shall make inquiry of the appropriate law enforcement or other agency to determine if it is aware or has possession of any items or information required to be disclosed, etc,

MOTION CUT-OFF

Motion cut-off is SEVEN DAYS prior to trial. All motions shall cite supporting authority.

Done this the 31st day of March, 2005.

Tracy Nickson
Azzie Melton - DDA

William A. Shashy
WILLIAM A. SHASHY
Circuit Judge

FILED
DALE COUNTY, AL
MAY - 2 2005

IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

CASE NO.: CC-04-1220

**MOTION FOR NEW TRIAL, OR, IN THE ALTERNATIVE,
FOR JUDGMENT NOTWITHSTANDING THE VERDICT**

Comes now, the undersigned counsel for Defendant in the above-styled action, and respectfully requests that this Honorable Court will grant a new trial in this matter, or, in the alternative, enter a judgment of acquittal notwithstanding the verdict rendered in the case by struck jury; as grounds he states as follows:

1. Trial of this action was concluded on 18 May 2005, and the verdict of guilt as to the lesser included charge of Assault 2d Degree was rendered by the jury on the same day.
2. At the conclusion of the evidence, this Honorable Court charged the jury on the offenses of Assault, both 1st and 2d Degree, without a pre-submission instruction conference and without the knowledge of counsel as to its intent to so charge.
3. Despite repeated requests, the State has to this day failed to provide numerous items of discovery, among them, a copy of the indictment in this case, which was procured by the undersigned on the date of this motion.
4. Prior to rendering the verdict, the jury made several requests as to the evidence and as to the proper verdicts available to them.

5. The jury was apparently confused by the unrequested charges of the lesser included offenses, as is evidenced by their inquiry as to the propriety of finding the Defendant not guilty of the sole charged offense, Attempted Murder, by reason of self-defense.
6. Although this Honorable Court attempted to clarify this issue, it is probable that had the jury been instructed solely as to the offense for which the Defendant was charged, Attempted Murder, it would have acquitted him of that charge based on its belief that the Defendant indeed acted in self-defense, a finding that necessarily would have precluded a finding of guilt on any lesser included offense involving a crime against a person.
7. This Honorable Court certainly within its discretion could have overruled Defendant's objection to the inclusion of charges on the lesser included offenses of Assault (1st, 2nd or 3rd Degree); however, the Defendant was never afforded an opportunity to so object prior to the jury being so charged; moreover, such an objection would have been warranted in light of the variance between the specific nature of the crime for which Defendant was charged in the indictment, and the offense of Assault 2nd Degree, which contains within its definition the alternative of recklessness as opposed to specific intent.
8. "An attempt to commit murder requires the perpetrator to act with the specific intent to commit murder.... A general felonious intent is not sufficient." *Free v. State*, 455 So.2d 137, 147 (Ala.Cr.App.1984).
9. "The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

10. The finding by the jury of the commission by the Defendant of a lesser, non-specific intent crime other than the Attempted Murder for which he was charged indicates that the State failed to prove a prima facie case of that charge, permitting this Honorable Court to enter a judgment notwithstanding the verdict rendered.
11. The Defendant submits that had the jury been instructed only as to the sole specific-intent offense charged in the indictment, he would have been fully exonerated.
12. Defendant again renews his prior objections to the State's failure to provide evidence collected in this case, and hereby supplements these objections with another for State's failure to provide a copy of a written statement of witness Terrence Barr, which it had in its possession prior to trial, and requests as sanction for this ongoing abuse of the discovery process, which abuse has characterized this prosecution from its inception, the entry of a judgment notwithstanding the verdict.

WHEREFORE, these premises considered, Defendant respectfully requests that this Honorable Court will

- a. Grant unto the Defendant a new trial; or, in the alternative, will
- b. Enter a judgment of acquittal notwithstanding the verdict rendered; and/or will
- c. As sanction for the State's multiple and prejudicial discovery violations, enter a judgment of acquittal notwithstanding the verdict rendered, or
- d. Will schedule a hearing on this motion at which the issues raised herein may be heard and recorded.

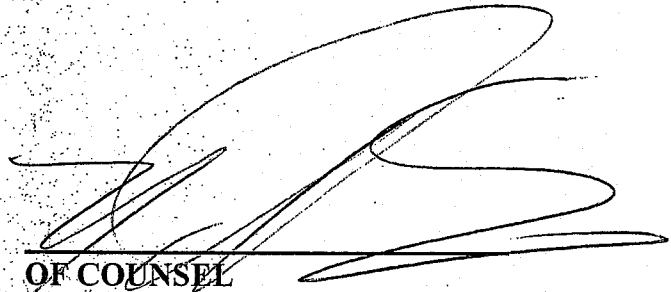
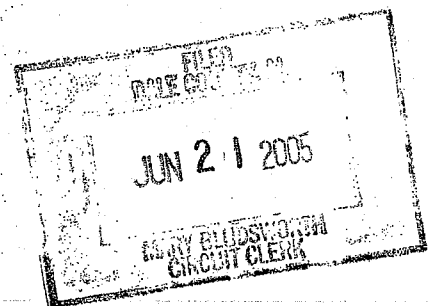
Respectfully submitted this the 20th day June, 2005.



**N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776**

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his box and/or by first class U.S. Mail, postage pre-paid on this the 20th day of June, 2005.


OF COUNSEL

ALABAMA BOARD OF PARDONS AND
PAROLES

REPORT OF INVESTIGATION

Type of Investigation: PSI **Date Dictated:** 06/01/2005
Name: HORNE GARY **PR#:** PR199507341400
Alias:
RS BM **DOB:** 10/16/1972 **Est. Age:** 32 **Height and Weight:** 6'00" | 190
Complexion: **Color of Hair:** BLK **Color of Eyes:** BRO
Bodily Marks:
Driver's License: **SSN:** 416983121,
AIS#: 180206 **FBI#:** 688599PA2 **SID:**
Phone #: 0000000000
Address: 189 LINDA ST
OZARK, AL 36360

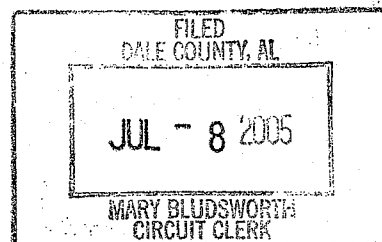
OFFENSE(S) OF INVESTIGATION

County: Dale **Case #:** CC 2004 000122.00
Offense(s):
ATTEMPT - MURDER

Sentence(s)	Date	Begin Date	Conf Imp	Conf Susp	Probation	Restitution
ASSAULT 2ND DEGREE : C						\$ 0.00

Date of Arrest: 01/16/2004 **Date of Bond:** 01/30/2004 **Bond Amt.:** \$ 30000.00
Judge: P. B. MCLAUCHLIN **D.A.:** ADAMS THOMAS KIRKE
Attorney: NICKSON N TRACY **Retained:** X **Appointed:**
Court Ordered Restitution: \$0

NOTES:



PRESENT OFFENSE(S)

County Court
and Case
Number:
Offense(s)

Dale, CC 2004 000122.00

ATTEMPT - MURDER

Sentence(s)

Date	Begin Date	Conf Imp	Conf Susp	Prob.	Rest.
ASSAULT 2ND DEGREE : C					\$ 0.00

Date of
Sentence:

Details of
Offense:

(1) On January 15, 2004 Gary Horne and John Williams got into an argument and a fight ensued. John Williams was shot during the fight with a .40 cal handgun. This occurred at 1298 South Union Ave., Arrowhead Apartments, Ozark Al. at 10:15 pm. Investigative report indicate that the victim and Gary Horne had been arguing over the defendants sister, Shenica Horne on Mark Ave. in Ozark. The victim left and went to his mom's residence at Arrowhead Apartments and Gary Horne and his sister followed. Again, Gary Horne and John Williams became engaged in a verbal exchange which led to a fight. During the fight Horne pulled a handgun and shot John Williams in the upper torso. Gary Horne then fled, however he turned himself in to police a couple of hours later. He was formally charged with Attempted Murder. Police responded to the scene where they found the victim lying in the front yard with a gunshot wound. He was transported to Dale Medical Center where he was treated. Gary Horne had a jury trial and was found guilty of Assault 2nd and a sentencing investigation was ordered.

On Probation At
Arrest: No

On Parole At
Arrest: No

Serious Physical
Injury Barring
Parole: No

Subject's
Statement: (1) I did not commit this crime.

Case Status of
Co-defendants: (1) NONE

Victim
Notification
Information: (1) The victim in this case is John Williams who resides at 514 E. Eufaula St. Ozark Al.

Victim Impact: (1) A victim Impact Form has been sent to John Williams.

Location of
Offense: Dale Co.

Court Ordered
Restitution: \$0

RECORD OF ARREST(S)

Date	Agency ORI	Type	Charge	Disposition
------	------------	------	--------	-------------

://pappsi.alabpp.gov/print/default.aspx

0 050

6/7/2005

	Prior Adult		Other:
	Prior Adult		Other:
03/01/1993 Dale Co	Prior Adult	RSP 2nd (YO)	Other: 1 year suspended, 18 months prob., 01/04/1995 prob. revoked
03/06/1993 Dale Co	Prior Adult	B&E Veh. 2 cts.	Other: Reduced to Theft 3rd rec. a 60 day SS
08/17/1993 OPD	Prior Adult	Speeding	Other: Guilty
02/08/1994 OPD	Prior Adult	Obstruct. Police - Crim. Impersonation	Other: Guilty
03/24/1995 Pike Co	Prior Adult	Hindering Prosecution 1st	Other: 1 year and 1 day
05/24/1995 Dale Co	Prior Adult	Robbery 2nd	Other: 5 years
11/25/1997 Dale Co	Prior Adult	Burglary 3rd	Other: Dismissed
01/29/1998 Dale Co	Prior Adult	RSP 2nd	Other: Dismissed
09/10/2001 Dale Co	Prior Adult	POM 2nd	Other: Guilty 6 mo. SS and 500.00 fine. Subject still owes over 700.00 on his fine and cost.

PERSONAL/SOCIAL HISTORY

Marital Status/History Separated

Name	Address	DOB	DOD	Marriage Begin/End
------	---------	-----	-----	--------------------

Children

Name	Address	DOB	DOD	Other Parent
Gemontae Horne		07/10/2002		
Geona Horne		03/30/2000		
Gary Horne Jr.		01/21/1999		

Housing History

Orphanage:	No	Homeless:	No
Foster Home:	No	Other Institution:	No
Boarding School:	No		

Health

Physical Disability:	No
Mental Disability:	No
Psychological Report:	No
Prescribed Medications:	No
Drugs Opinion	Denies
Of Drug Problem:	
Past Drugs:	Yes MARIJUANA

Port of Investigation

Treatment History:**Present Drugs:**

No

Defendants Opinion**Of Alcohol Problem:**

Denies

Education**High School**

Last Grade Completed	Name/Year	If DropOut, Reason why:
-----------------------------	------------------	--------------------------------

HS Graduate	Carroll High ,	
-------------	----------------	--

College

Last Level Completed	Name/Year	If DropOut, Reason why:
-----------------------------	------------------	--------------------------------

Attended College	Troy University,	Was sent to Prison
------------------	------------------	--------------------

Further Education/Training

Type	Place	Length	Completed
-------------	--------------	---------------	------------------

Financial Status**Owns:** Car**Money Owed****To****Amount**

Fines

\$

Employment History

Type/Employer	Begin Date	# Months	Pay	Reason For Leaving
Cook \ Larry's BBQ	/	9	7.50	
Laborer \ City of Newton	/	24	5.15 Hr.	

Military Record

Registered W/Selective Service	Served	Length Of Service	Discharge Type
Yes	National Guard	1 year	Honorable

Discharge Reason	Highest \ Discharge Rank	Military Job Title	Medals/Awards
-------------------------	---------------------------------	---------------------------	----------------------

Notes: Subject states he got out of the military because he did not like serving. This information has not been verified.

Offender's Family**Parents**

Father	Address	DOB	Felony Conv.	Deceased
Jerry Horne	Dothan Al.		No	
Mother	Address	DOB	Felony Conv.	Deceased

Port of Investigation

Mary Horne	Dothan Al	No
<u>Siblings</u>		
Name	Address	DOB Felony Conv.
Shanell Horne	Ozark	
Toby Horne	Ozark	
Priscilla Horne	Ozark	
Shanicce Horne	Ozark	
Renee Horne	Ozark	
Johnny Horne	California	

Notes:

Personal Relationship

Relationship w/father: Good
Relationship w/mother: Good
Relationship w/siblings: Good

PROBATION PLAN

Home

Living With	Address	Relation
No One	189 Linda St Ozark Al	

Employment

Employer	Address	Phone	Pay Rate
Horne's Roofing- Cousin	Ozark		400.00 week

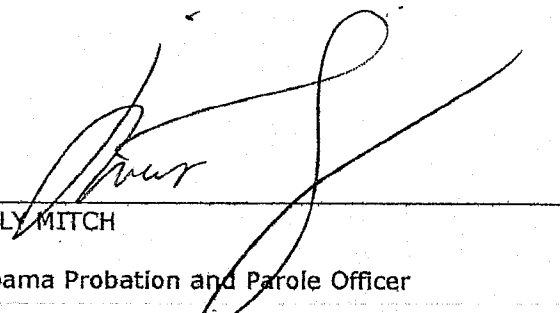
Treatments

Treatment Type	Treatment Description
-----------------------	------------------------------

Officer Remarks: The defendant has been on probation in Dale Co before and this probation was revoked. His criminal record dates back over 10 years.

Recommendations To Court: NONE

Signed and dated at Ozark
 Alabama the 7th day of June 05



 EARLY MITCH
 Alabama Probation and Parole Officer

Port of Investigation

PBF 203

Reviewed By

IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

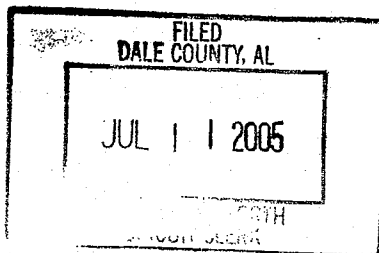
CASE NO.: CC-04-1220

MOTION TO CONTINUE

Comes now, the undersigned counsel for Defendant in the above-styled action, and respectfully requests that this Honorable Court will continue sentencing in said action; as grounds he further states as follows:

1. A sentencing hearing is currently scheduled to be held on 13 July 2005 at 9:30 a.m.
2. The undersigned is currently scheduled to appear in Pike County Circuit Court in Case No. CV-04-48; a copy of notice thereof is attached hereto. This setting precedes the setting in the instant action.
3. The undersigned has, in a separate document, requested a hearing in the instant action which, if permitted, will probably precede, and potentially delay, sentencing in the instant action.
4. No prejudice will inure to any party as a consequence of the requested continuance.

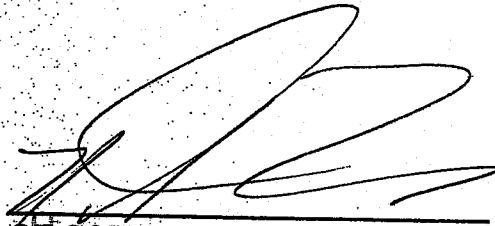
Respectfully submitted this the 8th day of July, 2005.



N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his box and/or by first class U.S. Mail, postage pre-paid on this the 8th day of July, 2005.

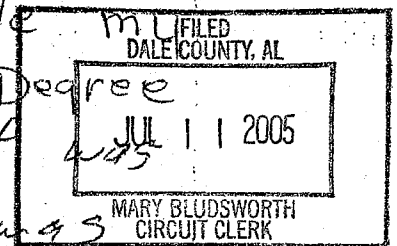


OF COUNSEL

OF

Dear, Mr. Nixon my name is Andrew M. Cray. I was chosen to be one of the Juror on the Gary Horne case. I was very burden and upset on the day I gave my Verdicts. I was distracted in the Court Room during the Trial. There was number of thing that was going on phone Ringing, People walking IN and out of Courtroom. When Back in the Juror Room I made decision to give a second Degree Verdict^{edit} on what I thought was best on the evidence I was presented. After going home I heavily Burden on my decision. No doubt in my mind that Gary Horne had acted in ~~Self~~ defense. I feel like I let Gary down, as well as our Justice system. I like to take this time to ~~Apologize~~ Apologize tell Gary and His family Sorry FOR letting the system down as well as him.

Andrew M. Cray



IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

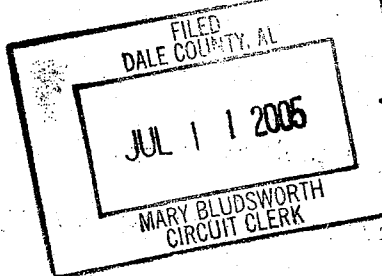
CASE NO.: CC-04-1229

MOTION TO CONTINUE

Comes now, the undersigned counsel for Defendant in the above-styled action, and respectfully requests that this Honorable Court will continue sentencing in said action; as grounds he further states as follows:

1. A sentencing hearing is currently scheduled to be held on 13 July 2005 at 9:30 a.m.
2. The undersigned is currently scheduled to appear in Pike County Circuit Court in Case No. CV-04-48; a copy of notice thereof is attached hereto. This setting precedes the setting in the instant action.
3. The undersigned has, in a separate document, requested a hearing in the instant action which, if permitted, will probably precede, and potentially delay, sentencing in the instant action.
4. No prejudice will inure to any party as a consequence of the requested continuance.

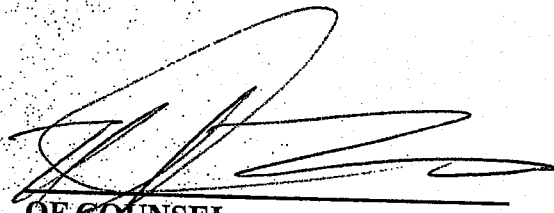
Respectfully submitted this the 8th day of July, 2005.



M. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his box and/or by first class U.S. Mail, postage pre-paid on this the 8th day of July, 2005.



OF COUNSEL

PIKE COUNTY CIVIL JURY DOCKET

Judge Thomas E. Head, III, Presiding

DOCKET/STATUS CALL SET FOR WEDNESDAY, JULY 13, 2005, AT 9:00 A.M.

CIVIL JURY TERM BEGINS AUGUST 22, 2005, AT 9:00 A.M.

CASE NO.	STYLE	ATTORNEY
CV 1999-H-227	COMMUNITY HEALTH VS. ROBERT GREENLAW	ALLEN JONES RICHARD SMITH NICK CERVERA
CV 2001-K-64	PIKE FARMERS CO-OP VS. JOE SENN	JOEL WILLIAMS KEITH WATKINS
CV 2001-B-112	ISABELLA MAXINE WARREN, ET AL VS. TROY HOSPITAL CORP., ET AL	GREG CUSIMANO MARK DAVIS
CV 2001-K-197	MIKE KILCREASE, ET AL VS. TYSON HOMEBUILDERS, ET AL	MIKE ROUNTREE ROBERT HALL JAMES WALDING
CV 2001-H-234	ANNIE MOSLEY PAUL VS. JASON BRADLEY SPEAR	FRANK RALPH PAUL JAMES, JR. MERRILL SHIRLEY
CV 2001-H-246	LARRY MCDANIEL, ET AL VS. FIRST NATIONAL BANK OF BRUNDIDGE	JOE SAWYER JOE FAULK
CV 2001-K-252	ELAINE PHELPS VS. ELIZABETH PATTERSON	FRANK RALPH JOHN PEEK

CV 2004-K-11	FAYE AND ROBERT MCGOVERN VS. CHARLES NONNENMAN	JOEL WILLIAMS DOROTHY POWELL
CV 2004-H-23	BARBARA AND MARY GREEN VS. FIRST QUALITY MANUFACTURING, ET AL	GORDAN MAYFIELD
CV 2004-B-41	JACK AND DIANE JORDAN VS. COUCH READY MIX, USA, ET AL	M. MCSWEAN RANDALL MORGAN
CV 2004-H-42	RICHARD W. GILCHRIST, JOE W. GILCHRIST & AMY GILCHRIST VS. AIMEE SIMONTON	MIKE JONES HAYES BROWN
CV 2004-K-48	DARNELL WHITE VS. CHARLES DRIVAS, EARL ELLIS, AND TROY LANDMARK	N.T. NICKSON ALLEN JONES RICHARD CALHOUN JEFFERY SMITH
CV 2004-H-70	KATRINA THORPE VS. CLEAR CHANNEL BROADCASTING, INC., ET AL.	DAVID THOMAS JOSEPH STOTT
CV 2004-B-80	ANTHONY AND JANET GRANT VS. JAMES (COLBY) MCLENDON	FRANK RALPH MIKE ROUNTREE
CV 2004-K-82	LESHUN CALHOUN, ET AL VS. MAURENA FINNEY, ET AL	STEVEN HENRY
CV 2004-H-97	PALOMAR INSURANCE CORPORATION VS. MARK KNOTTS	GRAY TRAWICK ALLEN JONES

LAW OFFICE OF
N. TRACY NICKSON
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

8 July 2005

Hon. Philip B. McLauchlin, Jr.
Dale County Circuit Judge, Presiding
P.O. Box 1305
Ozark, AL 36361

RE: *State of Alabama v. Gary Horne, CC-04-1220*

Dear Judge McLauchlin,

I hope this letter finds Your Honor well. It is written to apprise you of the existence of the enclosed letter, which was prepared by a juror who sat on the above referenced trial, conducted last month, over which Your Honor presided.

Shortly after the conclusion of the trial, I was informed by my client and his family that the juror, Mr. Andrew McCray, had approached my client's mother and expressed his dissatisfaction with the verdict rendered by him and his fellow jurors. I advised Mrs. Horne to refrain from initiating contact with the juror, and if contacted again, to advise the juror to reduce his concerns to writing and deliver them to either me or Your Honorable Court.

On 5 July 2005, I was informed that Mr. McCray had written a letter addressed to me and delivered it to an acquaintance of his to be forwarded to me. Upon my receipt of the letter, I have immediately forwarded copies to both Your Honor and Mr. Kirk Adams.

I am aware of the very limited circumstances in which a jury verdict may be revisited or analyzed for purposes of a new trial, and in all likelihood this letter is of no practical consequence whatsoever. However, I would be remiss in my duty to my client were I to neglect to seek to gain whatever beneficial result to my client may accrue thereunto from the letter, specifically as concerns the potential confusion it may indicate to have existed among the jury regarding appropriate verdicts.

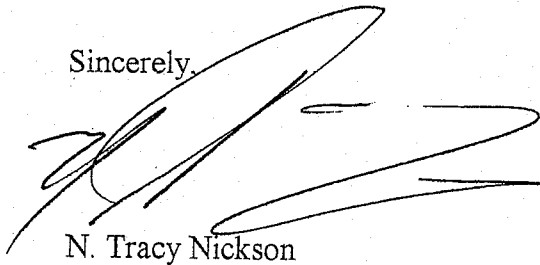
It is and has been my belief that the jury was indeed confused as to its verdict options, as evidenced by its question regarding the applicability of the defense of self-defense as grounds of acquitting Mr. Horne of Attempted Murder as charged by the indictment. As Your Honor may recall, Mr. Horne was charged with Attempted Murder but convicted of Assault 2d Degree. It remains my contention that the jury found Mr. Horne not guilty of the attempted murder charge by reason of self-defense, which would preclude a conviction for assault on the same grounds. If any testimony or affidavit supporting this contention were available, I respectfully seek Your Honor's guidance as to its admissibility for the purpose of demonstrating a level of confusion among the jury which would conceivably allow a new trial. Specifically, I am requesting a

hearing, *in camera* or otherwise, at which the issues raised by Mr. McCray's letter may be addressed. Frankly, this set of circumstances is one of first impression in my personal practice.

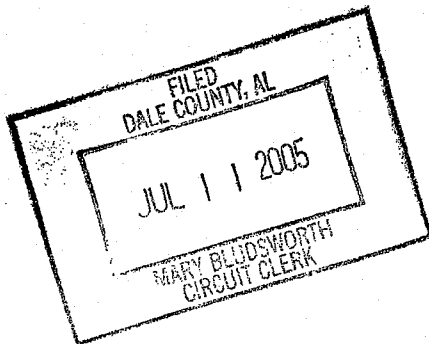
Also enclosed is a copy of the body of my Motion to Continue the sentencing hearing in this matter currently scheduled for 13 July 2005, based in part on a prior conflict which I am unable to abate.

Thank you very much for the time and assistance Your Honor affords this matter.

Sincerely,



N. Tracy Nickson



NTN/pab
Cc: file, Hon. Kirk Adams
Enclosures

PIKE COUNTY CIVIL JURY DOCKET

Judge Thomas E. Head, III, Presiding

DOCKET/STATUS CALL SET FOR WEDNESDAY, JULY 13, 2005, AT 9:00 A.M.

CIVIL JURY TERM BEGINS AUGUST 22, 2005, AT 9:00 A.M.

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CV 2004-H-23	BARBARA AND MARY GREEN VS. FIRST QUALITY MANUFACTURING, ET AL	GORDAN MAYFIELD
CV 2004-B-41	JACK AND DIANE JORDAN VS. COUCH READY MIX, USA, ET AL	M. MCSWEAN RANDALL MORGAN
CV 2004-H-42	RICHARD W. GILCHRIST, JOE W. GILCHRIST & AMY GILCHRIST VS. AIMEE SIMONTON	MIKE JONES HAYES BROWN
CV 2004-K-48	DARNELL WHITE VS. CHARLES DRIVAS, EARL ELLIS, AND TROY LANDMARK	N.T. NICKSON ALLEN JONES RICHARD CALHOUN JEFFERY SMITH
CV 2004-H-70	KATRINA THORPE VS. CLEAR CHANNEL BROADCASTING, INC., ET AL.	DAVID THOMAS JOSEPH STOTT
CV 2004-B-80	ANTHONY AND JANET GRANT VS. JAMES (COLBY) MCLENDON	FRANK RALPH MIKE ROUNTREE
CV 2004-K-82	LESHUN CALHOUN, ET AL VS. MAURENA FINNEY, ET AL	STEVEN HENRY
CV 2004-H-97	PALOMAR INSURANCE CORPORATION VS. MARK KNOTTS	GRAY TRAWICK ALLEN JONES

STATE OF ALABAMA,

Plaintiff,

vs.

GARY HORNE,

Defendant.

IN THE CIRCUIT COURT OF
DALE COUNTY, ALABAMA

CRIMINAL DIVISION

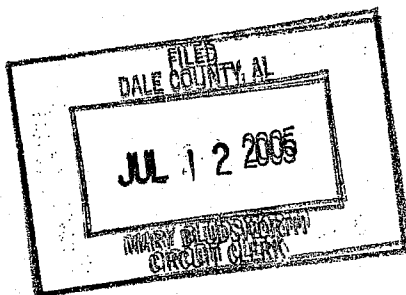
CASE NO. CC-2004-122

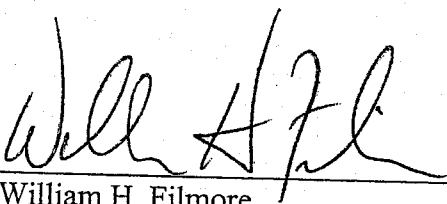
NOTIFICATION OF HABITUAL OFFENDER STATUS

The State of Alabama hereby gives notice to the Court and the Attorney for the Defendant that the Office of the District Attorney intends to prove that the Defendant is a habitual offender. The State intends to introduce a certified copy of a Robbery 2nd conviction from the Thirty-Third Judicial Circuit of Alabama dated May 24, 1995 and a certified copy of a Hindering Prosecution 1st conviction from the Twelfth Judicial Circuit (Pike County) of Alabama dated March 24, 1995.

As a habitual offender with two prior felony convictions, the Defendant must be punished for a Class A Felony for the Class C Felony upon which he was convicted in this cause. §13A-5-9(b)(1), *Code of Alabama*, 1975, as amended. As a Class A Felony the Defendant is looking at a minimum sentence of 10 years to life, however, pursuant to §13A-5-6(a)(4) the State contends that an enhancement should apply and the minimum mandatory sentence would be 20 years.

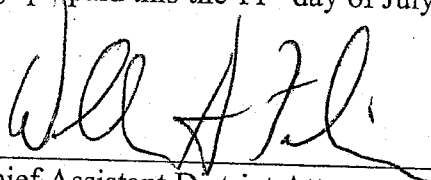
DATED this the 11th day of July, 2005.




William H. Filmore
Chief Assistant District Attorney
P.O. Box 1688
Ozark, AL 36361
(334) 774-9500

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has forwarded a copy of this notice to the Defendant's Attorney of Record, Honorable N. Tracy Nickson, to his address of 2181AA Cobbs Ford Road, Prattville, AL 36066, via U.S. Mail, postage prepaid this the 11th day of July, 2005.


Chief Assistant District Attorney

ACR359

ALABAMA JUDICIAL DATA CENTER
DALE COUNTY
TRANSCRIPT OF RECORD
CONVICTION REPORT

CC 2004 000122.00 01
P. B. MCLAUCHLIN

CIRCUIT COURT OF DALE COUNTY

COURT ORI: 026015 J

STATE OF ALABAMA VS.
HORNE GARY
LOT 46
HIDDEN GROVE TRAILER PARK
OZARK AL 36360

ALIAS:
ALIAS:

DC NO: GJ 2004 000028.00
G J: 28
SSN: 416983121
SID: 000000000
AIS: 180206

DOB: 10/16/1972 SEX: M HT: 6 00 WT: 180 HAIR: BLK EYE: BRO
RACE: () W (X) B () O COMPLEXION: AGE: FEATURES:

DATE OFFENSE: 00/00/0000 ARREST DATE: 01/16/2004 ARREST ORI: 0260100

CHARGES @ CONV CITES CT CL COURT ACTION CA DATE
ASSAULT 2ND DEGREE 13A-006-021 01 C CONVICTED 05/18/2005
00 00/00/0000
00 00/00/0000

JUDGE: P. B. MCLAUCHLIN

PROSECUTOR: ADAMS THOMAS KIRKE

PROBATION APPLIED GRANTED DATE REARRESTED DATE REVOKED DATE
() Y () N () Y () N () Y () N () Y () N

15-18-8, CODE OF ALA 1975 IMPOSED SUSPENDED TOTAL JAIL CREDIT
() Y (X) N CONFINEMENT: 22 00 000 00 00 000 22 00 000 00 00 014
PROBATION : 00 00 000 00 00 000
DATE SENTENCED: 07/13/2005 SENTENCE BEGINS: 07/13/2005

PROVISIONS

PENITENTIARY
HABITUAL OFDR

COSTS/RESTITUTION

DUE

ORDERED

RESTITUTION	\$0.00	\$0.00
ATTORNEY FEE	\$0.00	\$0.00
CRIME VICTIMS	\$100.00	\$100.00
COST	\$836.00	\$836.00
FINE	\$0.00	\$0.00
MUNICIPAL FEES	\$0.00	\$0.00
DRUG FEES	\$0.00	\$0.00
ADDTL DEFENDANT	\$0.00	\$0.00
DA FEES	\$0.00	\$0.00
COLLECTION ACCT	\$0.00	\$0.00
JAIL FEES	\$0.00	\$0.00
TOTAL	\$936.00	\$936.00

APPEAL DATE

SUSPENDED

AFFIRMED

REARREST

() Y () N () Y () N () Y () N () Y () N

REMARKS:

DEF SENT TO 22 YRS TO DOC.

THIS IS TO CERTIFY THAT THE
ABOVE INFORMATION WAS EXTRACTED
FROM OFFICIAL COURT RECORDS
AND IS TRUE AND CORRECT.

Mary Bludsworth
MARY BLUDSWORTH

07/14/2005

OPERATOR: SHS
PREPARED: 07/14/2005

0 073

IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA

CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

)
)
)
)
)
)
)

CASE NO.: CC- 04-1220

MOTION FOR NEW TRIAL

COMES NOW, the Defendant in the above-styled action, by and through the undersigned counsel, and respectfully requests that this Honorable Court will, pursuant to Ala. Code 1975 § 15-17-5, grant unto the Defendant a new trial; as grounds he states as follows:

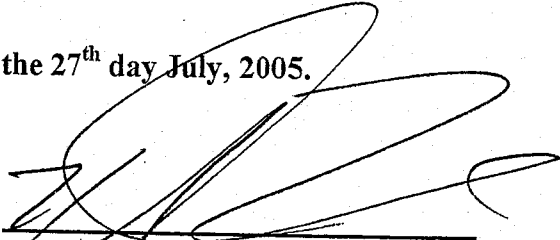
1. On 13 July 2005, this Honorable Court imposed a sentence of twenty-two years following a jury verdict finding the Defendant guilty of Assault 2d Degree.
2. The Defendant respectfully submits that he is entitled to a new trial for the following reasons:
 - a. Irregularity in the proceedings of the court, jury or state or any order of court or abuse of discretion by which the defendant was prevented from having a fair trial, specifically including, but not limited to:
 1. The State's failure to provide exculpatory evidence (an issue raised in separate documents which, along with other filed documents referenced within this Motion, is incorporated as if fully set out within this Motion);
 2. The Order of this Honorable Court in denying Defendant's motion to dismiss on *Brady* grounds, also raised in his previously filed Writ of Mandamus and related documents);

3. The Orders of this Honorable denying Defendant's motion for mistrial which was made on 16 May 2005 and renewed on 17 May 2005.
4. The Order of this Honorable denying Defendant's motion for directed judgment of acquittal which was made on 17 May 2005.
5. The State's failure to provide prior notice of intent to seek sentence enhancement pursuant to the Habitual Felony Offender Act;
6. The State's failure to provide documents purporting to prove prior felony convictions, which to this day the Defendant has not received;
7. The 13 July 2005 Order of this Honorable Court overruling Defendant's notice objections;
8. Confusion of the jury following instructions by the Court (also raised in a separate "Motion for New Trial" filed by Defendant);
- b. The verdict or decision is not sustained beyond a reasonable doubt and is contrary to law.

WHEREFORE, these premises considered, Defendant respectfully requests that this Honorable Court will

- a. For some or all of the grounds delineated above, grant unto the Defendant a new trial in this action; or, in the alternative, will
- b. Schedule a hearing at which the issues raised in this Motion may be heard and recorded.

Respectfully submitted this the 27th day July, 2005.



N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

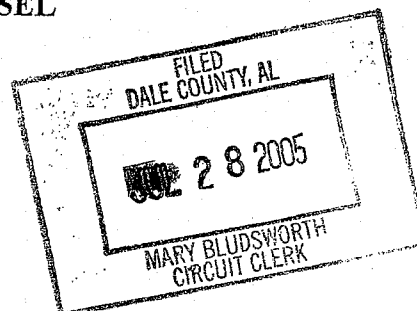
CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his box and/or by first class U.S. Mail, postage pre-paid on this the 27th day July, 2005.



OF COUNSEL

Hon. Kirke Adams
Dale County District Attorney
Hon. Stephen G. Smith
Dale County Assistant District Attorney
P.O. Box 1688
Ozark, AL 36361-1688



IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

CASE NO.: CC-04-1220

MOTION TO VACATE SENTENCE

COMES NOW, the Defendant in the above-styled action, by and through the undersigned counsel, and respectfully requests that this Honorable Court will vacate the sentence imposed in said action on 13 July 2005; as grounds he states as follows:

1. On 13 July 2005, this Honorable Court imposed a sentence of twenty-two years following a jury verdict finding the Defendant guilty of Assault 2d Degree.
2. At the 13 July sentencing hearing this Court, upon what was presumably a motion by the State, invoked the Habitual Felony Offender Act (HFOA) after finding the Defendant had been previously convicted of two prior felonies.
3. No notice, whatsoever was provided to Defendant or his counsel of the State's intent to seek invocation of the HFOA.
4. Describing the type of notice required before the HFOA can be invoked, the Supreme Court of Alabama stated in Connolly v. State, 602 So.2d 452, 454 (Ala.1992):

"For the HFOA to apply to a particular sentencing, the State must give reasonable notice, prior to the sentencing hearing, of the State's intention to proceed under the HFOA. Rule 26.6(b)(3), Ala.R.Crim.P. (Formerly Temp. Rule 6(b)(3)(ii), Ala.R.Crim.P.)...Determination of the 'reasonableness' of the notice period is left to the trial judge's discretion, because the trial judge is present and is familiar with the circumstances of the case. Humber v. State, 481 So.2d 452 (Ala.Crim.App.1985). The

7/29/05
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IOA

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Motion set Aug 4 at 9:30
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notice requirement is eliminated when during the trial the defendant admits the previous felony conviction. Petite v. State, 520 So.2d 207 (Ala.Crim.App.1987)."

5. To the best of the undersigned's recollection, this Honorable Court did not specifically state the kind of notice it found to have been provided to Defendant by the State; however, to the extent that representations made at the hearing by the State's Attorney contributed to invocation of the HFOA, Defendant avers that such representations are substantially inaccurate.
6. The State's representative, Mr. Stephen G. Smith, stated at the sentencing hearing that notice was provided to the undersigned of its intent to seek enhancement under the HFOA at a prior plea negotiation. There were no plea negotiations at which Mr. Smith was present, but rather the "negotiations" consisted of very few words exchanged between the undersigned and Mr. Kirk Adams or Mr. David Atwell.
7. At the time of these "negotiations," there was no specific mention of the crimes which the State intended to use to enhance, much less either notice that the state would seek to use them, nor were certified copies of the conviction(s) provided either then or now.
8. The State's representative, Mr. Smith, further averred at sentencing that a Notice of Intent to Enhance, or some kind of other notice, was filed on 11 July 2005; the case action summary in this action fails to reflect any such filing.
9. No copy of this notice document was provided to the undersigned before, or at, the sentencing hearing.
10. On or after 15 July 2005, the undersigned received via U.S. Mail a copy of the State's "Notification of Habitual Offender Status," a copy of which is attached to this Motion.
11. As can be seen, the Certificate of Service on the notification certifies that it was mailed on 11 July 2005; the clerk's date stamp reads 12 July; and the envelope in which the

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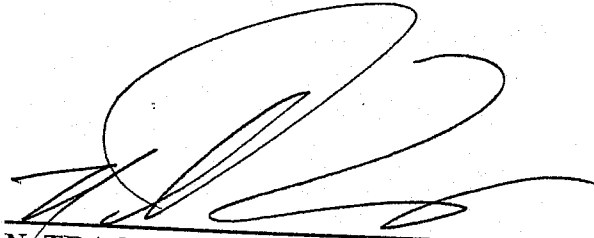
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undersigned received the notice (a copy of which is also attached hereto) is postmarked 13 July 2005.

12. Clearly it was and is temporally impossible for the undersigned to have received the notification prior to the sentencing hearing.
13. In Burgin v. State, 824 So.2d 77 (Ala. Crim. App. 2001), the Court of Criminal Appeals found that the State failed to give proper notice prior to second sentencing hearing of intent to seek enhancement under Habitual Felony Offender Act (HFOA), warranting remand for new sentencing hearing, where the record failed to reflect that state gave defendant notice before hearing that state intended to proceed under HFOA and record did not indicate that state notified defendant regarding what convictions state would attempt to prove at hearing. (See also Ala. Code 1975, § 13A-5-9).
14. To this day, Defendant has been provided with no documents whatsoever purporting to certify that Defendant has any prior conviction(s).
15. At no point in the course of this action has the Defendant either admitted any prior conviction(s), nor has he stipulated to any prior conviction(s), nor has he waived his right to notice of the State's intent to enhance his sentence.
16. The Defendant avers that because he was initially provided with notice, such as it was, of the State's intent to proceed under the HFOA a full days *after* sentencing, and further because to this day he has not been provided with certified copies of the alleged prior convictions, that such *ad hoc* notice was insufficient to invoke the Act, and concomitantly requests that this Honorable Court will
 - a. Re-sentence the Defendant under the range statutorily provided upon conviction of a Class C felony; or, in the alternative, will

- b. Schedule a hearing at which the issues raised in this Motion may be heard and recorded.

Respectfully submitted this the 27th day July, 2005.

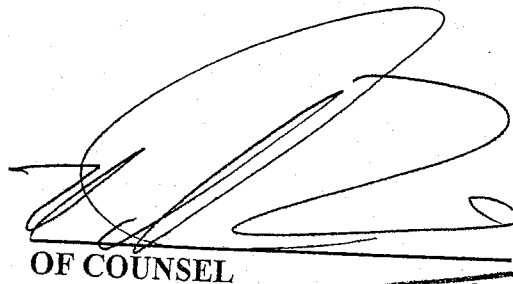


N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

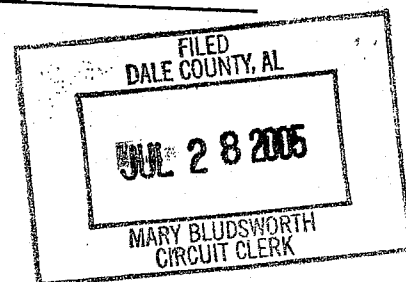
CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney at P.O. Box 1688, Ozark, AL 36361-1688 by placing same in his box and/or by first class U.S. Mail, postage pre-paid on this the 27th day July, 2005.

Hon. Kirke Adams
Dale County District Attorney
Hon. Stephen G. Smith
Dale County Assistant District Attorney
P.O. Box 1688
Ozark, AL 36361-1688



OF COUNSEL



STATE OF ALABAMA,

Plaintiff,

vs.

GARY HORNE,

Defendant.

IN THE CIRCUIT COURT OF
DALE COUNTY, ALABAMA

CRIMINAL DIVISION

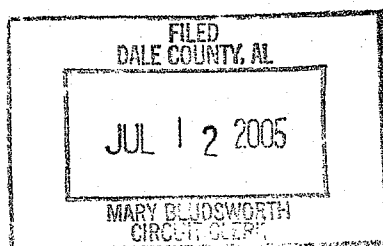
CASE NO. CC-2004-122

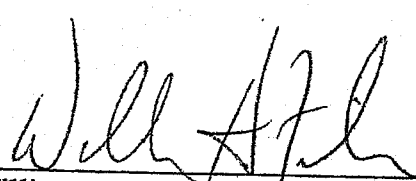
NOTIFICATION OF HABITUAL OFFENDER STATUS

The State of Alabama hereby gives notice to the Court and the Attorney for the Defendant that the Office of the District Attorney intends to prove that the Defendant is a habitual offender. The State intends to introduce a certified copy of a Robbery 2nd conviction from the Thirty-Third Judicial Circuit of Alabama dated May 24, 1995 and a certified copy of a Hindering Prosecution 1st conviction from the Twelfth Judicial Circuit (Pike County) of Alabama dated March 24, 1995.

As a habitual offender with two prior felony convictions, the Defendant must be punished for a Class A Felony for the Class C Felony upon which he was convicted in this cause. §13A-5-9(b)(1), *Code of Alabama, 1975, as amended*. As a Class A Felony the Defendant is looking at a minimum sentence of 10 years to life, however, pursuant to §13A-5-6(a)(4) the State contends that an enhancement should apply and the minimum mandatory sentence would be 20 years.

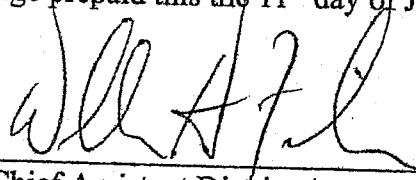
DATED this the 11th day of July, 2005.

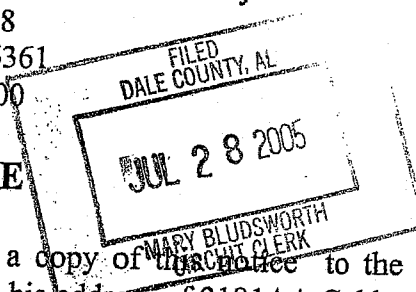


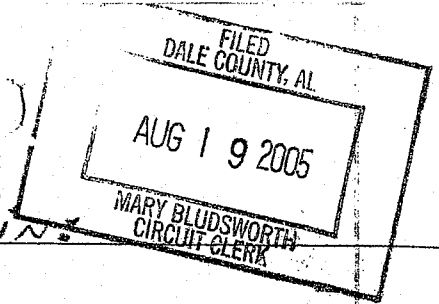

William H. Filmore
Chief Assistant District Attorney
P.O. Box 1688
Ozark, AL 36361
(334) 774-9500

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has forwarded a copy of this notice to the Defendant's Attorney of Record, Honorable N. Tracy Nickson, to his address of 2181AA Cobbs Ford Road, Prattville, AL 36066, via U.S. Mail, postage prepaid this the 11th day of July, 2005.


Chief Assistant District Attorney





Honorable P.B. McLaughlin:

My name is Gary Horne, your Honor I haven't been heard throughout this whole action. I just wanted to say I ~~am~~ innocent, but I would of pleaded guilty if the D.A. told me they was gonna pursue the Habitual Felony Offender Act when they offered me the Asslt. 2nd, 10 years. I would of taken it just so I wouldn't be facing 20 + years if I lost at trial, my point is that they NEVER gave us NO notice; oral or written. Me nor my lawyer knew anything until the Sentencing Hearing started. I was completely shocked because he told me I was looking at 1 - 10 years. He didn't get there notice until July 15, 2005. Please Your Honor if you give me a RE-SENTENCE since they blotched the notice requirement, and give me the max which is 10 years, I would be blessed that you did your job as a Judge and I could come home to my children.

The prosecution team has been over zealous from day one. The trial matter will be heard on appeal, it doesn't matter if you deny it, you did your job with good discretion and ethics, the prosecution set it up so I would not have a fair trial by getting rid of all exculpatory and impeachment evidence... willful or inadvertent. Just please correct this illegal sentencing and sentenced me to 1-10 years by law for what I was convicted of so I don't have to wait for the appellate courts to do right. I have 3 children to take care of and I can't go to work-release with all this 22 years. Everything the DA said at the hearing to vacate was hearsay, records don't reflect that they gave me nor my lawyer notice prior to sentencing hearing. Please rule in our favor just once, I was found guilty on May 18 they had ample time to send out that Notification of Habitual Offender Status before July 13, they could of send it when we got the sentencing date. Instead of sending it 2 days after hearing, that's not reasonable.

))
STATE OF ALABAMA) CIRCUIT COURT OF
PLAINTIFF) DALE COUNTY, ALABAMA
)
VS.)
)
GARY HORNE) CASE NO. CC-04-122
DEFENDANT)

TRIAL COURT'S RULING ON
MOTION FOR NEW TRIAL

This cause coming on to be heard is submitted for a judgment on the Motion For New Trial or in the alternative Motion For Judgment Notwithstanding the Verdict and the Motion To Vacate The Sentence and the Court having considered the same, the Court finds as follows:

On May 18, 2005, the Defendant was found guilty of Assault in the 2nd Degree by verdict of the Jury. On July 13, 2005, the Defendant was adjudged guilty and sentenced to 22 years to the state penitentiary at the sentencing hearing.

A probation report was prepared by the Probation Officer and filed in the Court file on July 8, 2005. The Record Of Arrest portion of the report listed two prior adult felonies:

- 1) 5/24/95 – Dale County – Robbery II – 5 years
- 2) 3/24/95 – Pike County – Hindering Pros. I – 1 year and 1 day

This report was available to the Court, the District Attorney and the Defense Counsel.

On July 12, 2005, a Notice of Habitual Offender Status was filed by the District Attorney listing the State's intent to prove the two prior felonies and to invoke the Habitual Offender Law.

The Court finds that the Defendant was aware that he had two prior felony convictions. This has never been disputed. At the Sentencing Hearing, the State proved the two prior convictions and filed certified copies of the convictions.

The provisions of the Habitual Offender Law are mandatory. The Trial Court has no discretion as to whether a repeat offender should be punished as an Habitual Offender. The State Prosecution has no discretion as to whether or not to produce evidence of prior convictions and he must do so if he is aware of the accused record.

In this case, at the time of the Sentencing Hearing the State, the Defendant, and the Defendant's attorney, and the Court were aware that the Defendant had two prior felony convictions and this has never been disputed. Therefore, the Defendant was properly sentenced as an Habitual Offender.

After both sides had rested, the Court asked for written requested charges. No written requested charged were presented to the Court. The Defense attorney did orally request for the Court to charge on self defense.

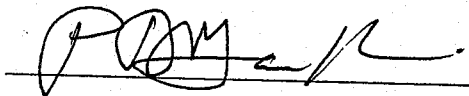
The Court finds that there was no prosecutorial misconduct and the Defendant's attorney had ample opportunity to interview Mr. Barr and Mr. Henderson and did interview them prior to trial. The Court further finds that the

Jury heard the evidence and returned a verdict of guilty of assault in the 2nd degree. The verdict of the Jury was sustained by the law and the evidence in the case. The Jury was polled and each Juror agreed as to the verdict of the Jury.

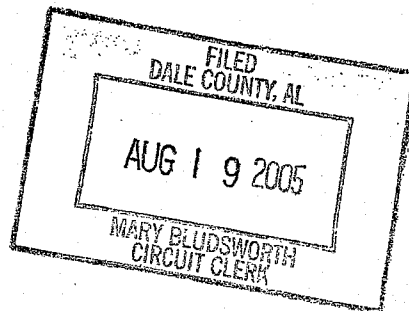
The Court has reviewed all of the other grounds of the motions and finds the grounds not well-taken.

Therefore, the motions filed by the Defendant are denied.

DATED THIS THE 19th day of August, 2005.



P.B. McLauchlin, Jr., Circuit Judge



IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

CASE NO.: CC-04-1220

**NOTICE OF APPEAL; MOTION TO APPOINT APPELLATE COUNSEL;
and MOTION FOR APPEAL BOND**

COMES NOW, the Defendant in the above-styled action, by and through the undersigned counsel, and respectfully offers this his Notice of Appeal and Motion to Appoint Counsel; further he states as follows:

1. The Defendant hereby files his Notice of Appeal of both the conviction entered on 18 May 2005 and the sentence imposed on 13 July 2005 in the above styled action.
2. In a separately and simultaneously filed document, the undersigned has moved to withdraw from further representation.
3. The Defendant has been rendered indigent ^{TO} as a result of his conviction, and respectfully requests that this Honorable Court will appoint counsel to prosecute his appeal.
4. The Defendant further requests that he be released on reasonable bond during the prosecution of his appeal; he represents risks neither of flight or danger to the community, and indeed was free on bond for virtually the entire duration of the proceedings up to conviction.

WHEREFORE, these premises considered, the Defendant respectfully requests that this Honorable Court will

- a. Appoint counsel to prosecute the Defendant's appeal; and will

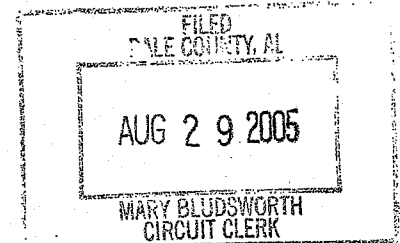
- b. Release the Defendant during the pendency of his appeal after his payment of reasonable bond.

Respectfully submitted this the 26th day August, 2005.

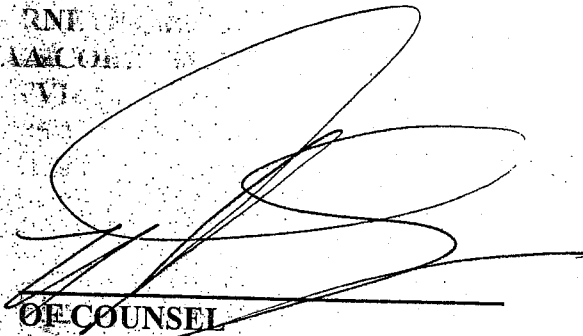


N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AAth COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

CERTIFICATE OF SERVICE



I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his box and/or by first class U.S. Mail, postage pre-paid on this the 26th day August, 2005.



OF COUNSEL

IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

CASE NO.: CC-04-1220

MOTION TO WITHDRAW

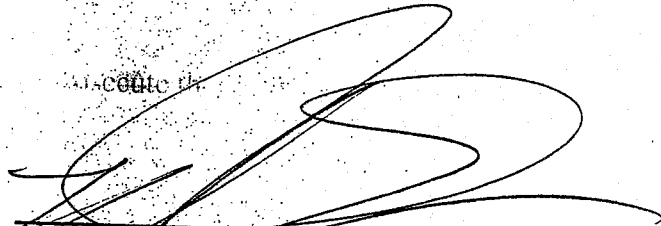
COMES NOW, the undersigned counsel for the Defendant in the above-styled action, and respectfully requests that this Honorable Court will, following its ruling or response to pending motions, permit the undersigned to withdraw from further representation of the Defendant; further he states as follows:

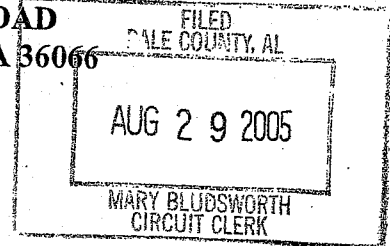
1. The Defendant in a separate and simultaneously filed document has filed his Notice of Appeal of both the conviction entered on 18 May 2005 and the sentence imposed on 13 July 2005 in the above styled action, and has further requested the appointment of appellate counsel.
2. The Defendant has also simultaneously filed a post-trial motion to clarify parts of this Honorable Court's prior Ruling on one of Defendant's post-trial motion.
3. The undersigned's contractual obligations to the Defendant have been met, and the indigency of the Defendant resulting from his conviction prevent him from retaining private appellate counsel.

WHEREFORE, these premises considered, the Defendant respectfully requests that this Honorable Court will

- a. Immediately appoint counsel to prosecute the Defendant's appeal; and following such appointment, will
- b. Relieve the undersigned counsel from further representation of the Defendant in the above-styled action; and will further

Respectfully submitted this the 26th day August, 2005.


N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776



CERTIFICATE OF SERVICE

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OF COUNSEL

0 090

IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA

CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

CASE NO.: CC-04-1220

POST-TRIAL MOTION TO CLARIFY POST-TRIAL RULING

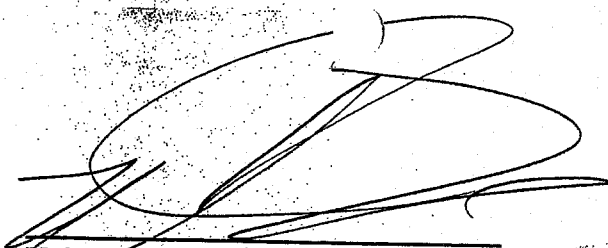
COMES NOW, the Defendant in the above-styled action, by and through the undersigned counsel, and respectfully offers this his post-trial Motion to Clarify the Ruling entered following Defendant's Motion for New Trial and to vacate sentence. The Defendant with all due respect and sincerity requests that this Honorable Court will, for the purposes of efficacious and economical appeal, clarify those aspects of the Ruling which concern the issue of notice regarding the Defendant's alleged prior felonies; further he states as follows:

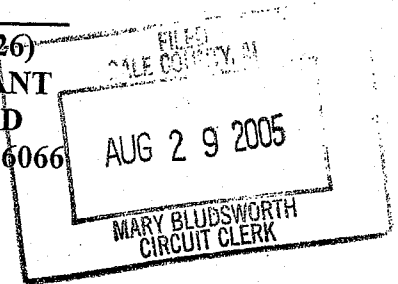
1. This Honorable Court on 19 August 2005 entered a Ruling in which it was held that the Defendant was properly sentenced as an habitual offender based on his awareness of two alleged prior felony convictions.
2. At the sentencing hearing conducted on 13 July 2005, and also within his prior Motion to Vacate Sentence, the undersigned respectfully requested that if this Honorable Court indeed found prior notice to have been given to the Defendant by the State of its intent to invoke prior felony convictions, that it would, for purposes of appeal, specifically state the form and time of the prior notice it found which conformed to the requirements of the Habitual Felony Offender Act (HFOA).

3. The Ruling refers to a probation report filed on 8 July 2005 in this case which purports the existence of two prior felony convictions.
4. The Ruling also refers to Notice of Habitual Offender Status filed by the District Attorney's office on 12 July 2005.
5. The Defendant respectfully requests, for the purposes of appeal, whether this Honorable Court found the probation report filed on 8 July to satisfy the prior notice requirements of the HFOA.
6. Likewise, The Defendant respectfully requests, for the purposes of appeal, whether this Honorable Court found the Notice of Habitual Offender Status filed on 12 July to satisfy the prior notice requirements of the HFOA; or whether perhaps these two filings combined in a totality of the circumstances to become prior notice as required by the HFOA.
7. The Defendant has contemporaneously filed a Motion to Appoint Counsel, and respectfully requests that this Honorable will toll the time for Defendant to file appeal pending response to this post-trial motion.

WHEREFORE, these premises considered, the Defendant respectfully requests that this Honorable Court will clarify its ruling as concerns the issue of prior notice of the State's intent to invoke the HFOA as that issue is posed herein; and further will toll the time for Defendant to file notice of appeal pending its response to this instant post-trial Motion.

Respectfully submitted this the 26th day August, 2005.


N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776



CERTIFICATE OF SERVICE

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OF COUNSEL

STATE OF ALABAMA

Vs.

**GARY HORNE
DEFENDANT.**

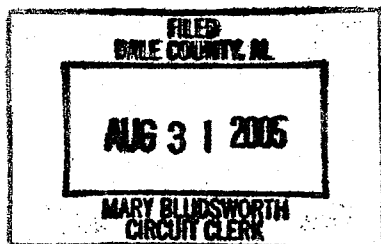
**IN THE CIRCUIT COURT OF
DALE COUNTY, ALABAMA**

CASE NO: CC-04-122

MOTION TO RECUSE

COMES NOW, the undersigned, and moves the Court to recuse him from the appointment to represent the above named Defendant for that he represents the victim, John Williams, and has give him advice and counsel that is contrary to the interests of this Defendant.

SUBMITTED, this the 31st day of August, 2005.



ROBERT G. ROBISON(rob037)
Attorney for Defendant
PO Drawer 70
Newton, AL 36352
(334) 299-3521

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date mailed a copy of the foregoing notice to the **HONORABLE KIRKE ADAMS** by placing a copy of same in the U.S. Mail, postage prepaid and addressing it to his proper mailing address this the 31ST day of August, 2005.

ROBERT G. ROBISON

IN THE CIRCUIT COURT OF DALE COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

GARY HORNE,
Defendant.

CASE NO.: CC-04-1220

MOTION TO DISMISS

Comes now, the Defendant in the above-styled action, and respectfully requests that this Honorable Court will enter an Order Dismissing said action; as grounds he avers as follows:

1. The Defendant is charged with Attempted Murder, and is scheduled for trial on 14 September 2004.
2. There is evidence in the case once held by the State but which now is unable to be located, to wit: one bullet of unknown caliber found at the scene of the alleged crime and retrieved by Lt. Rex Tipton, the previous case agent, and photographs of the scene taken by evidence technicians.
3. This bullet is crucial to the defense of this action; reference is hereby made to Defendant's "Motion to Preserve Evidence," filed with both the District Court and this Honorable Court on or about 27 April 2004; this Motion details the necessity for the bullet. Briefly, the bullet is strongly believed to have been fired from the same .40 caliber weapon which the alleged victim in the instant case sold to another person, now incarcerated, approximately two weeks after the alleged Attempted Murder.

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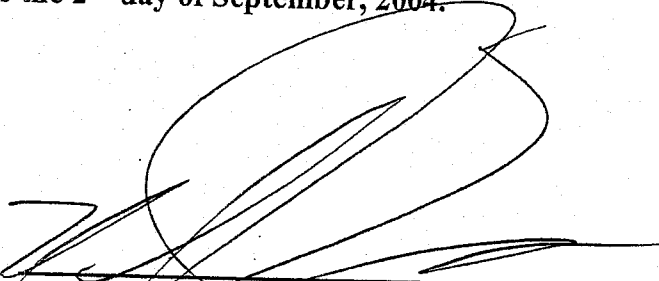
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4. This weapon is being held as evidence in another case arising in Dale County, *State v. Dassinger*, DC-2004-213, making matching of the bullet to the weapon readily possible were the bullet available.
5. Were the bullet to match the weapon sold to Dassinger by John Williams, the alleged victim in the instant case, it would prove the Defendant's theory of self-defense, which contends that Williams always had the weapon, assaulted the Defendant with it, and in the ensuing struggle was himself shot with his own gun.
6. Following the Defendant's Motion to Compel Discovery, filed with this Honorable Court on 14 May 2004, which was granted, the Defendant was allowed to inspect the evidence collected at the scene, which included, *inter alia*, a .40 caliber shell casing.
7. Lt. Rex Tipton was certain that a bullet was collected at the scene, a fact which he stated clearly to the undersigned counsel, counsel's legal assistant, and to Officer Chris Ford, the present case agent, on numerous occasions.
8. Moreover, the Narrative Summary prepared by Lt. Tipton clearly refer to photographs of the crime scene; these are also now unavailable.
9. The case against the Defendant is due to be dismissed. Failure by the State to provide exculpatory evidence, whether willful or, as in this case, inadvertent forecloses a verdict against the Defendant in any case. *Wilson v. State*, WL 1020014, ___ So. 2d ___ (Ala. 2003); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).
10. The law enforcement agents involved in the case concede that the bullet is in all likelihood irretrievably lost, and indeed all have expressed no interest whatsoever in pursuing the case.

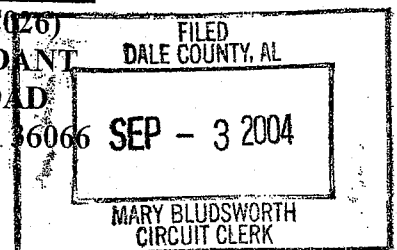
10. Because it would be legally and constitutionally impossible to maintain a potential finding of guilt, the action should be Dismissed.

Wherefore, these premises considered, the Defendant respectfully requests that this Honorable Court will enter an Order Dismissing the action, or, in the alternative, will schedule a hearing prior to the scheduled trial at which the issues raised herein may be heard and recorded.

Respectfully submitted this the 2nd day of September, 2004.

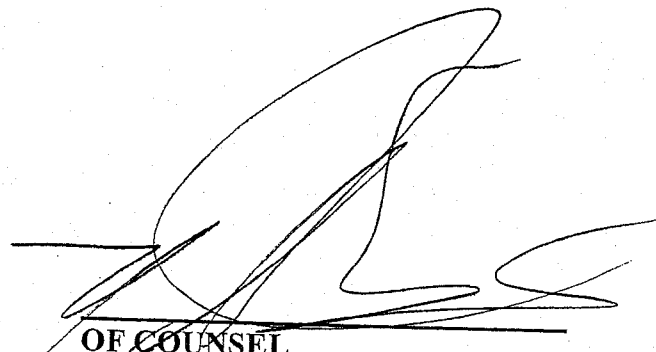


N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776



CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney by placing same in his/her box and or by first class U.S. Mail, postage pre-paid on this the 2nd of September, 2004.



OF COUNSEL
0 097

REV. 4/1/97

NOTICE OF APPEAL TO THE ALABAMA COURT OF CRIMINAL APPEALS BY THE TRIAL COURT CLERK

Gary Horne

APPELLANT'S NAME

(as it appears on the indictment)

V.

XX

STATE OF ALABAMA

CITY OF

APPELLEE

XX CIRCUIT

DISTRICT

JUVENILE COURT OF

Date

COUNTY

CIRCUIT/DISTRICT/JUVENILE JUDGE: P.B. McLauchlin, Jr.

DATE OF NOTICE OF APPEAL: 9/8/05

(NOTE: If the appellant is incarcerated and files notice of appeal, this date should be the date on the certificate of service, or if there was no certificate of service, use the postmark date on the envelope.)

INDIGENCY STATUS:

Granted Indigency Status at Trial Court:
Appointed Trial Counsel Permitted to Withdraw on Appeal:
Indigent Status Revoked on Appeal:

☐ Yes ☒ No
☒ Yes ☐ No
☐ Yes ☒ No

DEATH PENALTY:

Does this appeal involve a case where the death penalty has been imposed?

☐ Yes ☒ No

TYPE OF APPEAL: (Please check the appropriate block.)

☒ State Conviction☐ Rule 32 Petition☐ Probation Revocation☐ Mandamus Petition☐ Pretrial Appeal by State☐ Contempt Adjudication☐ Municipal Conviction☐ Writ of Certiorari☐ Juvenile Transfer Order☐ Juvenile Delinquency☐ Habeas Corpus Petition☐ Other(specify)

IF THIS APPEAL IS FROM AN ORDER DENYING A PETITION (I.E., RULE 32 PETITION, WRIT OF HABEAS CORPUS, ETC.) OR FROM ANY OTHER ORDER ISSUED BY THE TRIAL JUDGE, COMPLETE THE FOLLOWING:

TRIAL COURT CASE NO.:

DATE ORDER WAS ENTERED:

PETITION: ☐ Dismissed ☐ Denied ☐ Granted

IF THIS IS AN APPEAL FROM A CONVICTION, COMPLETE THE FOLLOWING:

DATE OF CONVICTION: 5/18/05

DATE OF SENTENCE: 7/13/05

YOUTHFUL OFFENDER STATUS:

Requested: ☐ Yes ☐ NoGranted: ☐ Yes ☐ No

LIST EACH CONVICTION BELOW: (attach additional page if necessary)

1. Trial Court Case No. CC 04 122 CONVICTION: Assault II
Sentence: 22 years
2. Trial Court Case No. CONVICTION:
Sentence:
3. Trial Court Case No. CONVICTION:
Sentence:

POST-JUDGMENT MOTIONS FILED: (complete as appropriate)

	Date Filed	Date Denied	Continued by Agreement To (Date)
XX Motion for New Trial	7/28/05	8/19/05	
<input type="checkbox"/> Motion for Judgment of Acquittal			
<input type="checkbox"/> Motion to Withdraw Guilty Plea			
<input type="checkbox"/> Motion in Arrest of Judgment			
<input type="checkbox"/> Other			

COURT REPORTER(S): David Glen

ADDRESS: Dale County Courthouse
Ozark, AL 36360

APPELLATE COUNSEL:

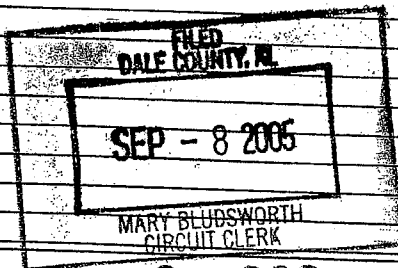
ADDRESS:

APPELLANT: (IF PRO SE) AIS#

ADDRESS:

APPELLEE (IF CITY APPEAL):

ADDRESS:



I certify that the information provided above is accurate to the best of my knowledge and I have served a copy of this

0 098

State of Alabama Unified Judicial System Form ARAP-1C 8/91	REPORTER'S TRANSCRIPT ORDER -- CRIMINAL See Rules 10(c) and 11(b) of the Alabama Rules of Appellate Procedure (A.R. App.P.)	Criminal Appeal Number _____
---	--	---------------------------------

TO BE COMPLETED BY COUNSEL FOR THE APPELLANT OR BY THE APPELLANT IF NOT REPRESENTED AND FILED WITH THE WRITTEN NOTICE OF APPEAL OR FILED WITHIN 7 DAYS AFTER ORAL NOTICE OF APPEAL IS GIVEN.

☒ CIRCUIT COURT ☐ DISTRICT COURT ☐ JUVENILE COURT OF _____ Dale _____ COUNTY _____

V. ☒ STATE OF ALABAMA ☐ MUNICIPALITY OF _____, Appellant

Case Number CC 04 122	Date of Judgment/Sentence/Order 7/13/05
Date of Notice of Appeal Oral: 8/29/05 Written: 9/8/05	
Indigent Status Granted: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

PART 1. TO BE SIGNED IF THE APPEAL WILL NOT HAVE A COURT REPORTER'S TRANSCRIPT:
 I CERTIFY THAT NO REPORTER'S TRANSCRIPT IS EXPECTED AND THAT THE RECORD ON APPEAL SHALL CONSIST OF THE CLERK'S RECORD ONLY. IF THE APPEAL IS FROM DISTRICT COURT OR JUVENILE COURT, I ALSO CERTIFY (1) THAT A STIPULATION OF FACTS WILL BE INCLUDED IN THE CLERK'S RECORD AND THAT THE APPELLANT WAIVES HIS RIGHT TO A JURY TRIAL IF SO ENTITLED; OR (2) THAT THE PARTIES HAVE STIPULATED THAT ONLY QUESTIONS OF LAW ARE INVOLVED AND THAT THE QUESTIONS WILL BE CERTIFIED BY THE JUVENILE/DISTRICT COURT FOR INCLUSION IN THE CLERK'S RECORD (SEE RULE 28(A)(1), ALABAMA RULES OF JUVENILE PROCEDURE, AND §12-12-72, CODE OF ALABAMA 1975).

Signature _____ Date _____ Print or Type Name _____

PART 2. DESIGNATION OF PROCEEDINGS TO BE TRANSCRIBED. Request is hereby made to the court reporter(s) indicated below for a transcript of the following proceedings in the above referenced case (see Rule 10(c)(2), Alabama Rules of Appellate Procedure (A.R.App.P.)):

MARK PROCEEDINGS REQUESTED:

A. ☒ **TRIAL PROCEEDINGS** - Although this designation will include the judgment and sentence proceedings, a transcript of the organization of the jury and arguments of counsel must be designated separately.

B. ☒ **ORGANIZATION OF THE JURY** - This designation will include voir dire examination and challenges for cause. Note that in noncapital cases the voir dire of the jury will not be recorded unless the trial judge so directs. (See Rule 19.4, ARCP.)

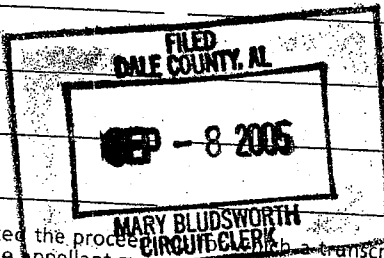
C. ☐ **ARGUMENTS OF COUNSEL** - Note that in noncapital cases the arguments of counsel will not be recorded unless the trial judge so directs. (See Rule 19.4, ARCP.)

COURT REPORTER(S)
 David Glen

 David Glen

IN ADDITION TO ANY PROCEEDINGS DESIGNATED ABOVE, SPECIAL REQUEST IS HEREBY MADE TO INCLUDE THE FOLLOWING PROCEEDINGS IN THE REPORTER'S TRANSCRIPT PORTION OF THE RECORD ON APPEAL. (ATTACH ADDITIONAL PAGES IF NECESSARY):

ADDITIONAL PROCEEDINGS REQUESTED	DATE	COURT REPORTER(S)
D. _____	_____	_____
E. _____	_____	_____
F. _____	_____	_____
G. _____	_____	_____



IMPORTANT NOTICE: The court reporter who reported the proceedings requested must be identified on this form to be effective. Additionally, it is important to note that the appellant may not be permitted to raise any issue on appeal relating to any proceedings in the case that are not specifically designated on this form for inclusion in the reporter's transcript. A general designation such as "all proceedings" is not sufficient. (See Rule 10(c)(2), A.R.App.P.)

PART 3. MUST BE SIGNED IF THE APPEAL WILL HAVE A COURT REPORTER'S TRANSCRIPT:
 I CERTIFY THAT I HAVE DISTRIBUTED THIS FORM AS SET OUT BELOW. I ALSO CERTIFY (1) THAT I HAVE MADE SATISFACTORY FINANCIAL ARRANGEMENTS WITH EACH COURT REPORTER LISTED ABOVE FOR PREPARING HIS OR HER PORTION OF THE REPORTER'S TRANSCRIPT HEREIN REQUESTED; OR (2) THAT THE APPELLANT PROCEEDED AT TRIAL AS AN INDIGENT AND THAT THAT STATUS HAS NOT BEEN REVOKED; OR, (3) THAT THE APPELLANT HAS BEEN GIVEN PERMISSION TO PROCEED ON APPEAL IN FORMA PAUPERIS.

Signature _____ Date 9/7/05 Joseph T. Gallio

State of Alabama Unified Judicial System Form ARAP- 26 (front) 8/91	COURT OF CRIMINAL APPEALS DOCKETING STATEMENT	Criminal Appeal Number _____
---	--	------------------------------

A. GENERAL INFORMATION:

☒ CIRCUIT COURT ☐ DISTRICT COURT ☐ JUVENILE COURT OF _____ Dale _____ COUNTY _____
 Gary Horne _____, Appella

V. ☒ STATE OF ALABAMA ☐ MUNICIPALITY OF _____

Case Number CC 04 122	Date of Complaint or Indictment 3/2/04	Date of Judgment/Sentence/Order 7/13/05
Number of Days of Trial/Hearing 1 Days	Date of Notice of Appeal Oral: 8/29/05	Written: 9/08/05
Indigent Status Requested: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Indigent Status Granted: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		

B. REPRESENTATION:

Is Attorney Appointed or Retained? <input checked="" type="checkbox"/> Appointed <input type="checkbox"/> Retained. If no attorney, will appellant represent self? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Appellant's Attorney (Appellant if pro se) (Attach additional pages if necessary) Joseph J. Gallo	
Address 451 N. Daleville Ave Suite 105	City Daleville State AL Zip Code 36324
Telephone Number 334/598-6200	

C. CODEFENDANTS: List each CODEFENDANT and the codefendant's case number.

Codefendant	Case Number
Codefendant	Case Number
Codefendant	Case Number

D. TYPE OF APPEAL: Please check the applicable block.

- | | | | |
|--|--|--|---|
| 1 <input checked="" type="checkbox"/> State Conviction | 4 <input type="checkbox"/> Pretrial Order | 7 <input type="checkbox"/> Juvenile Transfer Order | 10 <input type="checkbox"/> Other (Specify) _____ |
| 2 <input type="checkbox"/> Post-Conviction Remedy | 5 <input type="checkbox"/> Contempt Adjudication | 8 <input type="checkbox"/> Juvenile Delinquency | |
| 3 <input type="checkbox"/> Probation Revocation | 6 <input type="checkbox"/> Municipal Conviction | 9 <input type="checkbox"/> Habeas Corpus Petition | |

E. UNDERLYING CONVICTION/CHARGE: Regardless of the type of appeal checked in Section D, please check the box beside each offense category for which the appellant has been convicted or charged as it relates to this appeal. Also include the applicable section of the Code of Alabama for State convictions.

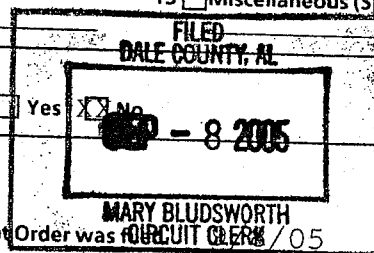
- | | | |
|---|--|--|
| 1 <input type="checkbox"/> Capital Offense - § _____ | 6 <input type="checkbox"/> Trafficking in Drugs - § _____ | 11 <input type="checkbox"/> Fraudulent Practices - § _____ |
| 2 <input type="checkbox"/> Homicide - § _____ | 7 <input type="checkbox"/> Theft - § _____ | 12 <input type="checkbox"/> Offense Against Family - § _____ |
| 3 <input checked="" type="checkbox"/> Assault - § 13A-6-21 | 8 <input type="checkbox"/> Damage or Intrusion to Property - § _____ | 13 <input type="checkbox"/> Traffic - DUI - § _____ |
| 4 <input type="checkbox"/> Kidnapping/Unlawful Imprisonment - § _____ | 9 <input type="checkbox"/> Escape - § _____ | 14 <input type="checkbox"/> Traffic - Other - § _____ |
| 5 <input type="checkbox"/> Drug Possession - § _____ | 10 <input type="checkbox"/> Weapons/Firearms - § _____ | 15 <input type="checkbox"/> Miscellaneous (Specify): _____ - § _____ |

F. DEATH PENALTY:

Does this appeal involve a case where the death penalty has been imposed? ☐ Yes ☒ No

G. TRANSCRIPT:

- Will the record on appeal have a reporter's transcript? ☒ Yes ☐ No
 - If the answer to question "1" is "Yes," state the date the Reporter's Transcript Order was _____ (Date)
 - If the answer to question "1" is "No":
 - Will a stipulation of facts be filed with the circuit clerk? ☐ Yes ☐ No
 - Will the parties stipulate that only questions of law are involved and will the trial court certify the questions? ☐ Yes ☐ No
- NOTE: If the appeal is from the district or juvenile court and the answer to question "1" is "No," then a positive response is required for question 3(a) or 3(b).



Form ARAP- 26 (back) 8/91

COURT OF CRIMINAL APPEALS DOCKETING STATEMENT

H. POST-JUDGMENT MOTIONS: List all post-judgment motions by date of filing, type, and date of disposition (whether by trial court order or by the provisions of Rules 20.3 and 24.4 (ARCrP)):

DATE OF FILING			TYPE OF POST-JUDGMENT MOTION	DATE OF DISPOSITION		
Month	Day	Year		Month	Day	Year
7	13	05	Motion for New Trial	8	19	05

I. NATURE OF THE CASE: Without argument, briefly summarize the facts of the case.

Defendant charged with attempted murder. Defendant convicted of Assault II; sentenced to twenty (22) years as habitual felony offender

J. ISSUE(S) ON APPEAL: Briefly state the anticipated issues that will be presented on appeal. (Attach additional pages if necessary.)

Not known until record received

K. SIGNATURE:

0 101

ACR371

ALABAMA JUDICIAL DATA CENTER
 NOTICE OF APPEAL TO THE ALABAMA COURT OF CRIMINAL APPEALS
 BY THE TRIAL COURT CLERK
 IN THE CIRCUIT COURT OF DALE COUNTY
 STATE OF ALABAMA VS HORNE GARY JUDGE: P. B. MCLAUCHLIN

APPEAL DATE: 09/08/2005

INDIGENCY STATUS:

GRANTED INDIGENCY STATUS AT TRIAL COURT:

APP. TRIAL COUNSEL PERMITTED TO W/D ON APPEAL:

INDIGENT STATUS REVOKED ON APPEAL:

INDIGENT STATUS GRANTED ON APPEAL:

YES	<input checked="" type="checkbox"/>	NO
YES	<input checked="" type="checkbox"/>	NO
YES	<input checked="" type="checkbox"/>	NO
YES	<input checked="" type="checkbox"/>	NO

DEATH PENALTY: NO

APPEAL TYPE: STATE CONVICTION

THIS IS AN APPEAL FROM A CONVICTION.

DATE OF CONVICTION: 05/18/2005

DATE OF SENTENCE: 07/13/2005

YOUTHFUL OFFENDER STATUS: DENIED

CO/CASE NUMBER: 26/CC 2004 000122.00

CODE: ASS2 CONVICTION: ASSAULT 2ND DEGR

ACTION: CONVICTED

STATUTE: 13A-006-021

SENTENCE: CONF: 22 YRS 00 MOS 000 DAYS

SENTENCE: PROB: 00 YRS 00 MOS 000 DAYS

LIFE: NO LIFEWD: NO

POST-JUDGMENT MOTIONS FILED:

DT FILED

DT DENIED

CON BY AGREE

☐ MOTION FOR NEW TRIAL
☐ MOTION FOR JUDG. OF ACQUIT
☐ MOTION TO W/D GUILTY PLEA
☐ MOTION FOR ATTY TO W/DRAW
☐ OTHER

COURT REPORTER(S):

ADDRESS:

GLENN, DAVID M.
 C/O HON. P.B. MCLAUCHLIN
 OZARK, AL 36361

APPELLATE COUNSEL #1:

ADDRESS:

GALLO JOSEPH JAMES
 451 N DALEVILLE AVE
 SUITE 105
 DALEVILLE, AL 36322
 334-598-6200

PHONE NUMBER:

APPELLATE COUNSEL #2:

ADDRESS:

PHONE NUMBER:

APPELLANT (PRO SE):

ADDRESS:

HORNE GARY
 LOT 46
 OZARK
 180206

AIS #:

AL 363600000

APPELLEE (IF CITY APPEAL):

ADDRESS:

I CERTIFY THAT THE INFORMATION PROVIDED
 ABOVE IS ACCURATE TO THE BEST OF MY
 KNOWLEDGE AND I HAVE SERVED A COPY OF
 THIS NOTICE OF APPEAL ON ALL PARTIES TO
 THIS ACTION ON THIS 8th DAY OF September 2005

OPERATOR: SHS
 PREPARED: 09/08/2005

Mary D. Duda
 CIRCUIT COURT CLERK

AP 14-3 Certificate of Completion and Transmittal of Record on Appeal by Trial Clerk

**CERTIFICATE OF COMPLETION AND TRANSMITTAL
OF RECORD ON APPEAL BY TRIAL CLERK**GARY HORNE

Appellant

V.

State of Alabama Appellee

TO: The Clerk of the Court of Criminal
Appeals of AlabamaCase No. CC-2004-122Date of Notice of Appeal 9-8-2005

I certify that I have this date completed and transmitted herewith to the appellate court the record on appeal by assembling in (a single volume of _____ pages) (1 volumes of 200 pages each and one volume of 47 pages) the clerk's record and the reporter's transcript and that one copy each of the record on appeal has been served on the defendant and the Attorney General of the State of Alabama for the preparation of briefs.

I certify that a copy of this certificate has this date been served on counsel for each party to the appeal.

DATED this 12th day of September, 20 05.

Mary Bludsworth
Circuit Clerk

Date

County

Civil Action No. _____

STATE OF ALABAMA

Dale _____ County _____

CIRCUIT COURT**CERTIFICATE OF COMPLETION
AND TRANSMITTAL OF RECORD
ON APPEAL BY TRIAL CLERK**

Gary Horne

APPELLANT**V.****STATE OF ALABAMA
APPELLEE****FILED** 12th

September _____, 20 05

Mary Bludsworth
Clerk

STATE OF ALABAMA) IN THE CIRCUIT COURT OF
) DALE CO., ALABAMA
)
VS.) CASE NO. CC-04-122
)
GARY HORNE)
) DEFENDANT)

---o0o---

The following Jury Trial began on the 16th day of May, 2005, in the Dale County Courthouse, Ozark, Alabama, before the Honorable Judge P.B. McLauchlin, Jr.

APPEARANCES:

FOR THE STATE

Bill Filmore
Asst. District Attorney
Ozark, Alabama

FOR THE DEFENDANT

Tracy Nickson
Attorney At Law
Dothan, Alabama

PROCEEDINGS:

(Whereupon, the Jury Panel was both generally and
(specially qualified by the Court, Voir Dire was
(conducted by counsel for the State and Defendant,
(and a Jury was struck, following which the following
(occurred out of the hearing of the Jury:

MR. NICKSON: I would object to Mr. Filmore trying this case because he was the District Court Judge that bound Mr. Horne over. I just witnessed Mr. Smith say something to one of my key witnesses, one of my eye witnesses, and he left here in tears saying he could not testify. I do not know what he said, but I have now lost another witness and I've lost evidence in this case. The Prosecution has --

THE COURT: Was he subpoenaed by the State?

MR. SMITH: Your Honor, he was subpoenaed by the Defendant and he is on the witness list from the Task Force. He gave a statement originally in this case and then he has subsequently given another statement to Officer Henderson last week that I became aware of. I discussed that with him and that was really all I talked to him about was the statement he had given.

MR. NICKSON: And is the Prosecution not under a continuing duty to disclose these statements?

MR. SMITH: Well, it was just revealed to me today what he had talked to Mr. Henderson about. It was the end of last week. I would be happy to

THE COURT: Mr. Henderson will need to tell you, or, you give him a copy of the statement.

MR. SMITH: Right, he went in and talked – I will be happy to tell him that information and, I think that once he hears that, he will understand.

THE COURT: Just give him whatever information you've gotten from Mr. Henderson.

MR. SMITH: Okay. Kirke was the one that actually talked to Eddie.

MR. NICKSON: When I don't know, and the Prosecution speaks to one of my witnesses and he leaves here saying he can't testify and he's leaving here crying, then I –

THE COURT: he has the right to talk to the witnesses.

MR. NICKSON: But not intimidate them.

THE COURT: I don't think Mr. Smith intimidated him by asking him questions.

MR. NICKSON: Like I said, I don't know what was said to this witness, but –

THE COURT: I don't think Mr. Smith intimidated him by –

MR. NICKSON: He said he couldn't appear here in this courtroom to –

THE COURT: You can subpoena him and put him up here and see what he says.

MR. NICKSON: Thank you, Your Honor. I object to Mr. Filmore trying the case.

THE COURT: Just let Steve (Smith) try the case and you'll get another one.

MR. FILMORE: Okay.

(Whereupon, Court was recessed until the following
(morning, following which the following occurred out
(of the hearing of the Jury:

MR. NICKSON: As to what occurred yesterday, I would like to renew my objection to the State's failure to provide discovery, which would be the most recent statement of Mr. Bar (PHON) and I have not had the opportunity to see this discovery, I have not had an opportunity to review it or to examine it, especially those new pieces of evidence. I did not get the statement yesterday, I just got the crux of what the statement was.

THE COURT: Where is the statement?

MR. SMITH: The statement was made to Eddie Henderson. Eddie Henderson came over to the office and it was there. Mr. Nickson was there in our office and I gave him what Mr. Henderson told me on the phone, then Mr. Henderson came over to the office and he was available and Mr. Nickson was

there and I believe that they actually were involved in a short discussion. I don't know if it was about the statement, but –

MR. NICKSON: It was not, Your Honor. I did not know who Mr. Henderson was, but he came in and he and Mr. Adams left immediately to discuss another matter. Then Mr. Smith came in with a tablet and said, "This is what was said." Yet I have never seen a statement of this witness.

THE COURT: Is it a written statement?

MR. SMITH: No. He just came into the office and talked to Mr. Henderson at the police station. He didn't take a written statement from him, he just came in and talked to him and told him what I told Mr. Nickson. Mr. Henderson can be here and he can testify or he can – if he wants to take his testimony, I can get him here.

THE COURT: We might have to just get him here.

MR. SMITH: Okay.

MR. NICKSON: Your Honor, the State indicated to me that the statement has taken a 180-degree turn and, for this reason, I believe there's been some form of witness tampering. I mean this gentleman made a statement shortly after the incident occurred and I was told a couple of weeks ago that he came in and made a contrary statement, not in writing and not under penalties or perjury, not sworn to.

THE COURT: Where is the witness? Is he here?

MR. NICKSON: Your Honor, he left out of here yesterday after Mr. Smith talked to him and he was in tears and I haven't seen him since. I can't find him.

MR. SMITH: All I did was ask him about what he had asked Mr. Henderson and he asked if that was going to come up and I said, "Well, if you testify, I will ask you about what you told Mr. Henderson."

THE COURT: Where is he now?

MR. SMITH: I don't know.

THE COURT: You need to find him and get him here.

MR. NICKSON: Your Honor, this statement given to the State, in an attempted murder prosecution, it's very unusual for a witness who has stuck to the statement he had made only hours after the incident occurred, to all of a sudden change his statement.

MR. SMITH: Well, I'll have Mr. Henderson here to testify about the statement, Your Honor, just so we can clear all this up, and he can ask him whatever questions he wants to, if the Court will allow that.

THE COURT: The first statement was for the State or against the State?

MR. SMITH: The first statement was to the benefit --

MR. NICKSON: To the benefit of the Defendant.

MR. SMITH: -- of the Defendant. I never said it was a 180-degree turn, but I said it was contradictory to what he had said before, and it was

contradictory to what he had said before. What he came in and told Mr. Henderson implicated the Defendant.

MR. NICKSON: Which was 180-degrees from what he had several hours shortly after the incident occurred. This statement, from my understanding, was given last week or the week before, which indicates to me that the – well, this trial was set once again two or three weeks ago and this totally looks like somebody has tampered with this witness, somebody has encouraged to go and say something that is contrary 180-degrees from what his statement has been for over a year and three months. Your know, I just –

THE COURT: Get an attachment for the witness and get him up here because I'm going to start this thing at 1:15, and have Eddie over here at 1:00.

MR. SMITH: Yes, sir.

MR. NICKSON: Your Honor, I'm asking for a hearing prior to trial to ascertain to what degree our witness has been tampered with.

THE COURT: I'm going to have Mr. Henderson here at 1:00.

MR. NICKSON: And all I want to know is to what degree our witness was tampered with and by whom.

THE COURT: Well, he's going to be here and you can ask him to see what happened.

(Short recess)

MR. NICKSON: I want to renew my objection once again to the State's failure to provide discovery. I have had no opportunity to see this

discovery or review and examine this particular piece of new evidence. I believe there has been some form of witness tampering and I am asking for a mistrial.

THE COURT: Motion denied.

MR. NICKSON: Thank you.

(Whereupon, after opening statements were presented, the
(following occurred:

JOHN WILLIAMS

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. SMITH:

Q Would you introduce yourself, please?

A John Williams.

Q Where do you live?

A I stay with my uncle right now at 156 Enterprise Road.

Q Here in Ozark?

A Yeah.

Q Where do you work?

A I own a restaurant.

Q What kind of restaurant?

A Chicken business off of East Andrews.

Q What's it called?

A The Red Zone.

Q What?

A The Red Zone.

Q Does that mean your wings are hot, you make hot wings?

A You can get any type of sauce you want on them.

Q Are you married now?

A No.

Q You were once married to Christina Williams, is that right?

A Yes.

Q And you have a child with Shanice Horne, is that right?

A Yes, sir.

Q How old is that child?

A He will be eight on his birthday, Friday.

Q His birthday is Friday?

A Uh-huh.

Q What's his name?

A Jaquan.

Q Jaquan?

A Yes.

Q And Shanice – let's go back to January the 15th of 2004.

A Okay.

Q Were you at Mr. Horne's apartment on that night? You were with him that night, is that correct?

A Yes, sir.

Q Where were you?

A He's got a house off Logan Road and we was at his house playing the X-Box.

Q Playing an X-Box?

A Yeah.

Q Video games?

A Uh-huh.

Q And who was there?

A It was me and him, a guy named Terrance Bar, Shanice came up with my son, and his girlfriend Kesha was there.

Q His girlfriend?

A Yes, she was there.

Q And what time of the night were you over there playing video games?

A It was 7:00 or 8:00, something like that.

Q Was it dark?

A I came out there during the daytime, you know, we always play the games for a long time, and it was dark when I left.

Q And were you and Gary playing video games together?

A Yes, sir.

Q Tell the Jurors what led to your wife coming over there? Do you know why she came – you were married to Christina at that time?

A Yes, sir.

Q And you are divorced now?

A Yes, sir.

Q Why did she come over there?

A Well, I didn't know what was taking place at first. We was in the garage playing the video games and his girlfriend Kesha came and asked me could she use my cell phone because he wouldn't let her use hers. So, I told her she had to go out there in the car and get it because my phone has a good signal. So, I told her she could go out there and use my phone. So, apparently she used it and they must have gone through my call log and called Christina and that's how she ended up coming out there.

Q Okay, so Christina shows up at Gary's house?

A Uh-huh.

Q What happened after Christina shows up?

A Well, we were still in the garage. He went and answered the door and he came back to me and said, "Hey man, your wife is at the door and you need to go check because you know how she is." So, I go to the door and I was - I call her Tina, and I go to the door and I said, "What's up?", and she was like, "What are you doing out here?", and I said, "Playing a game." And she was like, "It's time to go", and I said, "Let me get my keys and my pager", and stuff like that. So, I started to go get my keys and my pager and Shanice hit me in my face, you know.

Q Let me ask you this. Was she irritated that you were there?

A Yes, sir.

Q Christina was mad?

A Yes, sir.

Q And then you said you were going to get your keys?

A Yes, sir.

Q Where did Shanice hit you? How did she hit you?

A Well, she was standing in the door of the kitchen. Their kitchen and the front door is like in a little hallway, and I had to go by the kitchen walkway to get out the door. As I was walking by, she punched me in the face.

Q Why was she angry at you?

A Because she had this ongoing thing saying that I left her for Christina and went and married her.

Q Okay.

A That's why she was so upset.

Q Do you have children with Christina?

A Yes, sir.

Q How old are they?

A Eighteen or nineteen months old, something like that.

Q Okay. Very young?

A Uh-huh.

Q So, What happened after she hit you?

A Well, we ended up tussling into the kitchen. I never hit her, you know, but I basically grabbed her to keep her from hitting me. She just kept swinging. During the process, we fell over the kitchen table and fell all back in the corner

and everything like that. So, he started directing his attention basically toward me, pushing on me and stuff like that. Then I was –

Q Are you talking about Gary?

A Yes, sir.

Q Okay, so he got involved in your situation with her?

A Yes, sir.

Q Alright.

A From that point, I rushed him back to the refrigerator and he asked me what the hell I think I'm doing.

Q Okay.

A And I told him I was violating for me to have been out there anyway, you know. So, I started to leave and Shanice kept trying to fight on me as I was getting in the car and I am trying to pull off and she was steady trying to open the car door and punch on me and stuff like that. I got in my car and left and –

Q Did you leave by yourself?

A I was in the car by myself.

Q Had Christina left at that point?

A No.

Q She left after you did?

A She left after I did.

Q Did she follow you?

A Yes, sir.

Q What happened next?

A As I'm leaving Logan Road, Christina was following me and I looked in my mirror and Shanice was following her. So, we're all in a line following each other. I'm going to my mom's house because my mom don't allow no foolishness at her house, you know what I'm saying, she don't allow them to come over there and be acting up like that. So, I was going there to keep them from coming over there acting kind of crazy.

So, once I got – well, on my way there, you know, I called him on the phone, you know, because I thought we was cool and I basically said to him, "I think it's messed up the way you handled the situation", and he just started going all off talking about what he would do to me and stuff like that. I told him if he came to Arrowhead –

Q What was he saying he would do to you?

A He was just like, "I'll fuck you up, nigger, you don't know me", and stuff like that.

Q Okay.

A So, I told him – my comment to him was, "You know I'll beat your ass", and he was like, "Where you at, my nigger?", and I said, "Come to Arrowhead", you know, because that's where my mom stays and that's where I was at. So, I didn't think he was coming and I was sitting in my car and I noticed Shanice crunk her car up and she pulled right in behind me and –

Q Let's explain that. You said she cranked her car up?

A Yeah.

Q You had parked your car?

A Yes, sir.

Q And she -- had Christina parked her car?

A I pulled in the first parking spot, Christina pulled in the once beside me, and there was a couple of cars between us, between her car and the next available slot. So, Shanice got in that spot.

Q So, you are at Arrowhead Apartments?

A Yes, sir.

Q And you are parked in the parking lot at Arrowhead?

A Yes, sir.

Q Where was your car parked in relation to your mother's apartment?

A If you're facing her apartment, I was to the left of her apartment on the side of the dumpster.

Q Okay. How far away were you from her?

A Ten or fifteen feet.

Q So, you say Shanice cranked her car up and parked somewhere else?

A Well, she pulled in behind my car and she just sat there, I guess so I couldn't get out, or something like that.

Q Okay. Did Gary Horne show up there?

A He showed up about five or ten minutes after that.

Q Were you still sitting in your car?

A Yes, sir.

Q Why were you – where was Christina and Shanice?

A Christina was sitting in her car with the baby and Shanice was sitting in her car with my son.

Q And none of ya'll had gotten out of your cars?

A No, sir.

Q Why didn't you get out of your car? Were you still on the phone or what were you doing?

A No, I was just sitting there because I know how my mom is about people coming to her house acting up, so, I didn't really want to bring that there, but I went there just so they wouldn't come there with – I was thinking maybe they were going about their business, that's why I went there.

Q Okay. And you were sitting in your car when Gary Horne showed up?

A Yes, sir.

Q Tell the Jury about that?

A When I noticed – see, South Union runs parallel to Arrowhead Apartments and, when I noticed I seen this car shooting up the highway, you know, I kind of got on my defense then. I seen it shoot up in the apartment complex and he got in the slot where Shanice was initially parked at. So, by this time when he pulled up, I got out of the car and I stood up on the curb and I stood right there in front of Christina's car. When he stepped up on the curb, I noticed he had a gun because the gun almost fell and he picked it up with his pants.

Q What do you mean by "almost fell"?

A Because his pants was baggy.

Q He was wearing baggy pants?

A Yeah.

Q And the gun was in his pants?

A Yeah.

Q Did you notice it fall in his pants, is that what you're telling us?

A I noticed the – I know he had the gun because I made the comment to him, "You got a gun, you're tough now", because he was talking and he just kept talking smack to me as he was walking toward me.

Q Some of the Jurors may not understand when you say he was "talking smack" to you. What do you mean?

A He was arguing at me.

Q Arguing what?

A Just saying little gestures like, "What in the fuck did you have your wife come to my house for in front of my sister?", and stuff like that.

Q That's some of the things you mean by "smack"?

A Yeah, that's what I mean.

Q So, you say something to him about having a gun?

A Yeah, I said, "You got your gun, you're tough now" because of the way he kept talking to me. You know, he was talking basically like I was beneath him. I basically told him, "I ain't no punk", you know. So, he just kept mouthing off and he got – it seemed like he got louder and louder as we stood there.

Q Ya'll were standing how far apart?

A Less than four feet. It was like right there in front of Christina's car, it was directly in front of her car.

Q I'm going to walk to you and you tell me about how far away from him you were.

A About right there, maybe like that.

Q This far?

A Uh-huh.

Q And you were mouthing back to him, is that correct?

A Excuse me?

Q You were saying some smack back to him?

A Yeah, I basically was telling him like, "Because you've got a gun don't mean I'm going to back down from you", that's basically what I told him.

Q And what happened after that?

A Well –

Q How long – I mean was this very long?

A It was short, it was kind of short because I got tired of him talking.

Q Would it have been – I mean we're not talking about like a 5-minute conversation, are we?

A No.

Q Are we talking about maybe less than a minute?

A Somewhere in that vicinity, a minute, no more than two minutes once he got out of the car.

Q Okay.

A Everything happened within three minutes from the point he got out of the car, less than three minutes everything had took place.

Q Okay. Did he try to get you or how did this altercation start?

A Well, he was like standing in front of me and he just kept mouthing off and I just asked him, "What you want to do?", you know, and he pushed me.

When he pushed me, I went to strike him back and he shot me.

Q Okay. When he pushed you, did you fall backwards a little bit?

A Yes, sir.

Q And then he – did you try to swing at him?

A I tried to swing, yes.

Q At what point were you shot?

A I know that as I was swinging to hit him, as he was shooting me, I grazed his chin.

Q So, as you swung at him is when he pulled the trigger on you?

A Yes, sir.

Q Is that fair to say?

A Yes, sir.

Q Where did he – where did you get shot?

A In my side right here. (Indicating)

Q Are you right-handed?

A Yes, sir.

Q So, you swung at him like this?

A Yes, sir.

Q And then you were shot under here?

A Yes, sir.

Q Do you remember what happened after that?

A Well, I remember hitting the ground and, as I hit the ground, I heard my mom screaming. Then he stood over me like – like the same distance we were at the first time, and then made the comment, “I should kill this fuck nigger.”

Q Okay, did you see him holding a gun at that time?

A Yes, sir.

Q It was like a pistol, I guess?

A Yes, sir.

Q Did you have a gun?

A No, sir.

Q Do you own a pistol?

A I have a hunting rifle, an SK hunting rifle, that’s what I have.

Q But you don’t have a pistol?

A No, sir.

Q And you didn’t have a pistol at that time?

A I don’t have one at all.

Q Did you have one two weeks later?

A No, sir.

Q Did you ever sell a pistol to somebody?

A No, sir.

Q You went to the hospital, is that correct?

A Yes, sir.

Q Did you go to Dale Medical Center?

A Yes, sir.

Q How long were you there?

A I think I got out on the 21st of January.

Q And you were there a week?

A Yes.

Q Is that correct?

A Yes, sir.

Q What kind of treatment did you have while you were in the hospital?

A I'm not quite sure, I don't remember. They was telling me a bunch of stuff like stuff with my kidneys and they some intestines out of me and some more things.

Q Did you have surgery?

A Yes, sir, two of them.

Q Two surgeries?

A Yes, sir.

Q As far as when you got out of the hospital, did you have any – were you the same as you were before you went in?

A No, sir.

Q How has getting shot affected you physically?

A Well, I know the way I was before I got shot and I have a lot of back pain, when I urinate I have pain, when I use the bathroom I have pain.

Q Okay.

A Some mornings I can't even get out of the bed, you know, I just deal with it basically.

Q Would you stand up and point to the spot where the bullet hit you?

A Right here.

Q What did he say while he was standing above you?

A He made the comment, "I should kill this fuck nigger."

Q You heard him say that with your own ears, right?

A Yes, sir.

Q And you could see him with your own eyes?

A Yes, sir.

Q Was he standing over you looking at you when he said that?

A Yes, sir.

Q Did he stay there until help arrived?

A No, he ran. When my mom said that the police was on their way, the guy that was with him named Terrance Bar said, "Come on, my nigger, let's go", and they ran from that point.

MR. SMITH: Thank you.

EXAMINATION

BY MR. NICKSON:

Q Good afternoon, Mr. Williams.

A How are you doing?

Q You stated that you are divorced presently?

A Yes, sir.

Q And you say on the day in question ya'll were playing X-Box?

A Yes, sir.

Q And that's a video game?

A Uh-huh.

Q And how long had you been there at Mr. Horne's home?

A We had a chance to play maybe like three or four games.

Q How long does it take?

A It all depends on penalties in the game or something like that, or what the score is like, maybe going into overtime, or whatever, maybe twenty or thirty minutes at the most.

Q Per game?

A Per game.

Q And you were visiting there?

A Yes, sir.

Q And visiting with your son?

A Yes, sir.

Q And your girlfriend Shanice?

A No, she wasn't my girlfriend, it was my son's mother.

Q Had you been drinking?

A No, sir.

Q Nothing at all?

A Well, we smoked a blunt, if that's what you're trying to get at.

Q So, you were using prescription or non-prescription drugs?

A Yes, sir.

Q Are you under the influence of any drugs or alcohol at this time?

A No, sir.

Q And your relationship to Mr. Horne's sister is that she is your son's mother?

A Yes, sir.

Q During the time that you've known Ms. Horne, have you ever threatened her?

A No, sir.

Q Have you ever struck her?

A We've got into altercations before.

Q Have the police ever been called out?

A Yes, I've called them on her and she's called them on me.

Q How many times?

A We never had nothing like nothing serious, we never had nothing serious where she had bodily harm and stuff like that.

Q Okay.

A It wasn't never like that. When the police comes out for a domestic argument, or anything like that, someone goes to jail. I never went to jail on too many occasions.

Q Too many occasions?

A I probably went to jail like once or twice.

Q Was Mr. Horne's sister and your wife arguing?

A Shanice started arguing when Christina showed up.

Q And Christina was your wife at the time?

A Yes, sir.

Q Was your wife at the time inside the home?

A No, she was at the front door.

Q Was the front door open?

A He opened the door.

Q Did it stay open?

A Yeah.

Q And at the time you tried to leave, you say Ms. Horne hit you?

A I went to go retrieve my pager and my keys and, when I was coming out the door, that's when she struck me.

Q Were you and Shanice in an argument, or, did she just not want you to go, or, did you have some discussion about the child?

A I had called to talk to my son that day and, like always, I'm always asking her if I can see my son without all the drama that I have to go through to see him,

and she said, "We'll discuss it when I get there." You know, I asked him what did he want from KFC and he said he wanted some hot wings, so, that's what I brought him when I came. We was in the garage playing the video game when they came and I gave him his hot wings and told him we would be up there in a minute because we were outside smoking a blunt.

Q Okay. Do you and Shanice co-parent this child?

A Well, he stays with her, you know, and I had to go through the court system to try to get my visitation because when she gets mad with me she won't let me see him.

Q Do you pay child support?

A She didn't want child support.

Q So, you don't pay child support?

A No, I don't pay child support.

Q But the child is yours?

A Yes, sir.

Q So, it's your testimony that she attacked you?

A Yes, sir.

Q And isn't it true that night that you attacked Shanice?

A No, it's not true.

Q Didn't you grab her by the neck and didn't Mr. Horne have to pull you off of her?

A Well, I mean –

Q Did you grab her by the neck?

A No.

Q Not at all?

A No.

Q And you never gave Mr. Horne any cause to remove or separate you and his sister?

A Well, I just told you that he was separating both of us because, when she hit me, we got into an altercation and we fell over the kitchen table.

Q So, she hit you and then you went after her?

A Basically.

Q Do you recall the preliminary hearing in this matter back on February 18th?

A Yes, sir.

Q Do you recall we had a Court Reporter here in the courtroom?

A Yes, sir.

Q And do you remember that I asked you if you owned a gun?

A Yes, sir.

Q But you didn't have one that night?

A Right.

Q According to the statements taken that night, the majority of the witnesses indicate that they saw you strike Mr. Horne and –

MR. SMITH: I'm going to object to what other witnesses who have not testified yet had said.

THE COURT: Repeat your question.

MR. NICKSON: Mr. Williams, at the preliminary hearing we had back in February, it was --

A Uh-huh.

Q -- indicated that you had struck Mr. Horne twice?

A Did you hear me say that? Look at your notes again because you didn't hear me say that.

Q Did Mr. Horne make you leave the house?

A No, I left on my own.

Q You left on your own?

A Uh-huh.

Q And was it because of the altercation, or, because your wife wanted you to go?

A A little bit of both.

Q A little bit of both?

A Yes, sir.

Q Why were you and the Defendant arguing?

A I don't even know because everybody knows how his sister is, you know.

Q So, it was over Shanice?

A Basically.

Q Do you know a Mr. William Dassinger?

A Who is that?

Q William Dassinger?

A No.

Q Shortly after the shooting, did you sell a 40-caliber Glock?

A No, sir.

Q Have you ever owned one?

A No, sir.

Q Never?

A No, sir.

Q How many times have you been arrested for assaulting people?

A I'm not sure –

MR. SMITH: I object. He's not –

THE COURT: I overrule.

MR. SMITH: You can answer.

A I mean what – state your question again?

Q How many times have you been arrested for assaulting people?

A I don't know.

Q Is it so many times that you just don't remember?

A No, I'm just saying I don't know, I wasn't keeping a record when I would get into it with someone. People get in altercations every day.

Q Have you ever been arrested for attempted murder?

A No, sir.

Q Never?

A No, sir.

Q You are sure about that?

A Yes, sir.

Q Okay. Have you ever been arrested for domestic violence?

A Yes, sir.

Q When was the last time you were arrested for domestic violence?

A I'm not sure.

Q Isn't it true that right now you have a case pending against you for domestic violence 3rd?

A The case is not domestic violence, it's harassment. A cell phone was broken.

Q What were you charged with?

A Harassment.

Q When was the last time you were arrested for domestic violence?

A I'm not sure, I'm not too good at dates.

Q Mr. Williams, might you have been arrested for Assault 3rd back in '97?

A I'm listening to you.

Q I'm asking a question.

A You asked what now?

Q Were you arrested for Assault in the 3rd back in 1997?

A You are talking about '97, this is 2005.

Q I understand that, but the question was might you have been arrested back in '97 for –

A I'm not sure, that's eight years ago.

Q Were you arrested for possession and receiving controlled substance in 2003?

MR. SMITH: Your Honor, I object.

THE COURT: I sustain as to that.

MR. NICKSON: Sir?

THE COURT: I sustain.

MR. NICKSON: Mr. Williams, you have no idea what you have been arrested for throughout your life?

A Yeah, I have an idea what I've been arrested for, but what has that got to do with me getting shot, what I've been arrested for? I wasn't arrested the night he shot me.

Q Mr. Williams, I'm asking the questions.

A I understand that, but I'm just saying –

Q I simply asked you before have you been arrested for crimes and you said you didn't remember. I'm just trying to go through here and see if you were arrested for discharging a firearm in '93, possession of marijuana in '95, attempted murder in '95?

A I never – I never was – I never had to come to Court.

MR. SMITH: I object to him reading out his entire –

THE COURT: I sustain.

A I mean those charges and allegations that you are accusing me of, I never had to come to Court on any of those, they was all dismissed. So, I was the wrong person at the wrong time during those times.

MR. SMITH: Okay, and I didn't accuse you of them.

A I'm not saying you did, you know, you're just doing your job.

Q Back in September of 2004 were you arrested for domestic violence?

A I could have been.

Q And you filed a divorce back in 2004, right?

A When?

Q Back in 2004 you filed for divorce, or, did your wife file for divorce?

A I did.

Q You indicated that you were conscious after you were shot?

A Yes, sir.

Q And you never answered the question whether you struck Mr. Horne twice?

A I didn't strike him twice, I answered that question.

Q Pardon?

A I didn't strike him twice.

Q You didn't?

A No.

Q Did you strike him at all?

A I tried to.

Q And you didn't grab Shanice Horne by the neck?

A No, sir.

Q Never been arrested for attempted murder, domestic violence and you've never owned a handgun?

A I didn't say I never owned one, I said I don't have one.

Q Have you ever owned a handgun?

A Back in the day.

Q What's the "day"?

A I was a teenager, I'm 29 now.

Q So, about ten years ago?

A Basically.

Q And you don't know a William Dassinger at all?

A Not by that name. I mean you are saying "William Dassinger", and I know people by nicknames and stuff like that, I don't know everybody by their full name.

Q On that night you indicated to the Prosecution that you had made a phone call to Mr. Horne?

A Yes, sir.

Q Did you make just one phone call or several phone calls?

A Well, I was on the back road and you barely can get a signal back there with the particular cell phone I had. That's why I wasn't sure the first phone call went through and that's when I called back.

Q You just called twice?

A Yes, sir.

Q What was the purpose of you calling?

A Because I felt like we were friends and I basically wanted to let him know I didn't feel like it was right, you know what I'm saying, what he did and how he intervened in what was going on, like he was directing everything toward me.

Q So, you didn't believe he was right in intervening in what was going on in the home that he lived in with his children?

A Correct.

Q And he should have allowed you to continue with the ongoing thing with Shanice in his home?

A No, you're not understanding what I'm saying. You wasn't there, so, you don't know. I'm saying when he intervened, he shouldn't have been trying to stop me, he should have been trying to stop her because she was the one doing all the swinging and all the stuff like that.

Q So, if you are married to a woman that's at the door and she's jealous because of the girlfriend or the mother of your child inside, I don't understand why ya'll are fighting. You should have been just getting out, shouldn't you?

A Well, she never would have came if they never would have called her. They called her from my cell phone – they went through his girlfriend Kesha and Shanice Horne and they called her from my cell phone. They went to my call log and was calling and playing games on the phone with her and that's why she came out there.

Q How did they get your phone?

A She asked me could she use my cell phone.

Q And where was your phone?

A It was inside the car.

Q In your car?

A Yeah.

Q So, Ms. Horne's girlfriend and Shanice went out to your car to use your cell phone, correct?

A Kesha went to go get my cell phone. I'm not sure where they used it at because I was in the garage playing a video game. She asked him could she use his and he called her a bitch and told her no. They were arguing and that's why she had to use my cell phone.

Q So, she went to your car and used your cell phone?

A Correct.

Q Who came to your aid after Mr. Horne left?

A My mom was there, Christina was there.

Q Who?

A Christina. Shanice was there.

Q By your side?

A Well, she was standing up over me.

Q And that was pretty much immediate?

A Yes.

Q Did anyone remove anything from your pockets before the ambulance arrived?

A No, sir.

Q Nobody took anything out of your pockets?

A No, sir. What was supposed to have been taken out of my pocket?

Q Now, you said that you were violating for being out there to begin with?

A Yes.

Q What did you mean by that?

A Because of the way everything was going down, you know. I was in his house, me and his sister is into an altercation, and the wife is at the door, you know. So, the best thing for me to do is to leave. That's why I say I was violating from being there, that's why I left.

Q So, you weren't violating a probation term or anything like that?

A Oh, no, I'm not on probation.

Q How long have you known the Defendant?

A Well, we grew up on Logan Road together.

Q Okay. So, you've known him about 30 years?

A Maybe like twenty years, something like that.

Q About twenty years?

A Yeah.

Q Ya'll have been good friends?

A We was always alright, you know.

Q Always good friends?

A Okay, you know. It was not like we was best friends, but we was always on speaking terms.

Q You ran with him and he ran with you?

A I mean we stayed up the street from each other. I would go see him sometimes, he would come see me, stuff like that.

Q When did you cease this relationship?

A The night he shot me.

Q Mr. Williams, isn't it true that you're the one that had the gun?

A No, sir.

Q Isn't true that you're the one that made the first strike at Mr. Horne?

A No, sir.

Q Matter of fact, two of them and hit him?

A No, sir.

Q Isn't it a fact that you pulled that gun from your waist band?

A No, sir.

Q And in the tussle, you were shot by that gun?

A No, sir.

Q Do you know Mr. Mark Jolly?

A Who now?

Q Mark Jolly?

A Yes, sir.

Q And a female friend named Shawn?

A Who now?

Q A female?

A A female friend named Shawn?

Q Yes?

A I don't know any Shawn.

MR. NICKSON: Your witness.

EXAMINATION

BY MR. SMITH:

Q Just a couple of follow-up questions. Shanice followed you to Arrowhead Apartments?

A Yes, sir.

Q Gary Horne wasn't at Arrowhead Apartments when you arrived there and when Shanice arrived there?

A No, sir.

Q Shanice left Gary Horne's apartment or house?

A Yes, sir.

Q To follow you?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q Gary Horne shows up and shoots you?

A Yes, sir.

Q Is that pretty much the way it happened?

A That sums it all up.

Q Now, was Shanice in any danger when Gary Horne arrived?

A No, sir.

- Q Was she sitting in her car when Gary Horne arrived?
- A Her and my son was sitting in her car and sitting behind me.
- Q And you were in your car?
- A Yes.
- Q So, when he got out of his car, Shanice was still in her car?
- A She was still in her car. Then once we got –
- Q You weren't in the car with Shanice, were you?
- A No, sir.
- Q And you were in the car by yourself?
- A Yes, sir.

MR. SMITH: That's all.

EXAMINATION

BY MR. NICKSON:

- Q What kind of car do you have?
- A I had a Corsica at the time.
- Q Corsica?
- A A Corsica.
- Q Is that a compact car?
- A It was a four-door.
- Q Did it have bucket seats or bench seats?
- A Bucket seats.
- Q And you called Mr. Horne twice?
- A Yes, sir.

Q And just to find out what was going on?

A Basically to let him know I didn't agree with what had just happened.

Q Did you ever call Mr. Horne and ask him to come get his sister?

A No, sir.

Q Was she causing you any trouble there at the apartments? Any reason for you to be concerned?

A I mean she was just there and then she pulled behind me. I don't see how that's causing trouble because she's not bothering me sitting in the car.

Q When she pulled behind you, what did you do then?

A I was still sitting in the car. She pulled behind me so I wouldn't leave.

Q So, you were talking to her?

A No, you could hear her hollering.

Q So, you could hear her hollering in the car with --

A She had the window down, you know, and she made the comment, "I bet you won't go no where now", when she pulled behind me.

Q Did you make any threats to her?

A No, sir.

Q Did you make any threats to Mr. Horne?

A No, sir.

MR. NICKSON: Nothing further.

CHRISTINA PATTERSON WILLIAMS

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. SMITH:

Q Would you introduce yourself to the Jury, please?

A My name is Christina Patterson Williams.

Q Speak up a little bit.

A My name is Christina Patterson Williams.

Q And you are the ex-wife of John Williams?

A Correct.

Q And you were divorced in the last few years?

A Right.

Q I'm going to ask you a few questions about what happened on January the 15th of 2004, okay?

A Okay.

Q At that time you were married to John, is that correct?

A Yes.

Q You went over to Gary Horne's house at some point that evening?

A Yes.

Q Is that correct?

A Yes.

Q Tell the Jurors why you ended up going over there?

A That night somebody kept calling my cell phone from my husband's

phone and they wasn't saying anything. So, I thought it was him and I had went over to Gary Horne's house to check on my husband. When I arrived, I told my husband, "Let's go." He was leaving and Shanice Horne started hitting him and saying he wasn't going anywhere. At that point Gary started holding my husband and Shanice was still hitting him. So, John got in his car and I followed him and we went over to my mother-in-law's house.

Q Okay. So, you went over there and Shanice was mad because John was going to leave?

A Right.

Q Did Shanice hit John?

A Right, yes.

Q Did Shanice follow you two when you went back over to your mother-in-law's house?

A Yes.

Q Was your child with you when this happened?

A No, sir.

Q Were you in the car by yourself?

A I was in the car by myself and John parked and he was going to leave his car, but Shanice Horne blocked him in and that's when Gary Horne came over.

Q Shanice was blocking John in?

A Right.

Q Was she parked like in a –

A He parked and then she parked behind him so he couldn't leave.

Q Did you see when John arrived there?

A Yes, he was going to leave with me, but within seconds Gary Horne came and started arguing with my husband and he pushed my husband and it was like John was going to defend himself and Gary shot him.

Q Did John try to hit him back?

A I mean he -- like I said, it happened so fast, but he pushed my husband and then that's when he shot him.

Q Okay. Did you see Gary Horne shoot John?

A Yes, sir, I did.

Q And did Gary Horne have a gun?

A He had it within his waist and he grabbed it and shot my husband, yes.

Q And you saw the gun?

A I seen him right there, yes.

Q This is him?

A Yes.

Q What happened after that?

A My husband fell to the ground and he ran and there was another gentleman with him but I don't know his name. He jumped in his car and he took off and Shanice Horne was yelling, "Gary, why did you shoot John?", and --

MR. NICKSON: Object to hearsay.

THE COURT: I overrule.

MR. SMITH: And then did you stay until the ambulance came?

A Yes, I did.

MR. SMITH: Thank you very much.

EXAMINATION

BY MR. NICKSON:

Q Is it Ms. Williams?

A Patterson Williams, yes.

Q Ms. Patterson Williams, on that day where had your husband been all day?

A He was at Gary's house playing the Play Station.

Q All day long?

A I don't know about all day long, but I know when he had last called me, that's where he was at.

Q Did you know where he was going earlier in the day?

A Yes, he told me everywhere he goes, yes.

Q Where was he going earlier in the day?

A To his house, when he last called, to play the Play Station with him.

Q So, he was pretty much there all day?

A When he last called, yes, a couple of hours, yes.

Q And when you went to Mr. Horne's house, you went there because somebody was calling you from Mr. Horne's house?

A No, sir, somebody was calling from my husband's phone. It's a special ring when they call my phone so I know when it's my husband. And it was a female and they were playing games.

MR. NICKSON: Your Honor, may I treat the witness as hostile?

THE COURT: Go ahead and just ask questions and we'll see what happens.

MR. NICKSON: So, you came to Mr. Horne's house trying to find your husband?

A To get my husband.

Q To get your husband?

A Yes.

Q And when you got there, did you get upset because you saw Gary's sister there in his home?

A No, sir.

Q Not at all?

A No, sir.

Q Were you aware that Ms. Horne was Mr. Williams's girlfriend?

A How can he have a girlfriend when he is married?

Q It happens all the time.

A Well, they have a child together.

Q So, you knew he was there to visit the child?

A Right.

Q And when you arrived there did you go to the door?

A Yes, I went by the door, like the steps.

Q And did they shut you out?

A No, sir.

Q They didn't?

A No, sir.

Q They left the door open and invited you in?

A They were peeking out the window – somebody was peeking out the window. Then that's when my husband came up to the door to leave and that's when Ms. Horne started hitting him.

Q And when you saw Ms. Horne hitting him, then what happened? Did they shut the door on you then?

A No, the door was still open.

Q The door stayed wide open and you watched all this go on?

A Yes, I watched everything.

Q That being your husband, you didn't go in and help him?

A No, because that wasn't my house to go in.

Q After your husband got shot, did you and another lady start going through your husband's pockets?

A No, sir.

Q Were you upset when Ms. Horne followed you over to your mother-in-law's house?

A No, I wasn't upset because I'm used to that. She's always following us, stalking my husband, ex-husband.

Q And how do you know that?

A Because we used to live at an address and she used to jump out of the bushes, just arrive at all times of the night, you know, and I was just used to it.

Q How old are you?

A I'm twenty-two years old.

Q How long were you married to Mr. Williams?

A Three and-a-half years.

Q Have you ever filed domestic charges against Mr. Williams?

A No.

Q Have you ever called the police on a domestic violence call?

A Neighbors maybe, but not me, no.

Q Were you ever in the service?

A Yes, sir, I was in the Air Force.

Q Ever been to McGuire Air Force Base?

A Right.

Q Did an incident occur up there between you and Mr. Williams where he hit you in the mouth and broke several teeth?

A No, sir, that didn't happen. I fell down the stairs, but he didn't hit me.

Q Did he push you?

A No, he didn't push me.

Q Was he even present?

A Yes, he was there.

MR. NICKSON: Nothing further.

MR. SMITH: Nothing further.

KEITH CAUTHEN

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. SMITH:

Q State your name?

A Lt. Keith Cauthen.

Q And you are an Ozark Police Officer?

A Yes, sir.

Q How long have you been an officer with the Ozark Police Department?

A Twenty-four years.

Q What's your title?

A Watch Commander.

Q Watch Commander?

A Yes, sir.

Q Did you go to the scene at the Arrowhead Apartments where a shooting took place on January the 15th of 2004?

A Yes, sir, I did.

Q Tell the Jurors what you observed when you arrived at that scene?

A I approached the scene from the South Union side of the roadway across the grass onto where the sidewalk was. Upon arrival, I observed a black male lying on the grass in front of the O-Building of Arrowhead Apartments.

Q Was that individual identified as John Williams?

A Yes, sir.

Q And did you see that he was shot?

A After approaching, yes, sir.

Q He was laying on the ground when you approached?

A Yes, sir.

Q Who else do you recall seeing when you arrived at the scene?

A His mother was there, two other subjects were Ricky Ivey and a Bell subject, and I believe his wife was also there.

Q Okay. Did you see the gun in the area where Mr. Williams was shot?

A No, sir.

Q Did you look in the area around where he was shot?

A Yes.

Q In his immediate area?

A I had it secured immediately by the officers that arrived on the scene behind me and we processed the scene – I didn't process the scene, but we secured the scene and had it processed.

Q Did Mr. Williams have a gun?

A Not on him, no, sir, not on his person.

Q And you found no gun in the immediate area?

A No, sir.

Q Do you recall where Mr. Williams was shot?

A Upper torso.

Q Okay.

MR. SMITH: Thank you very much.

EXAMINATION

BY MR. NICKSON:

Q Lt. Cauthen, is that correct?

A Yes, sir.

Q My name is Tracy Nickson, how are you doing?

A Alright, sir.

Q You were the first officer on the scene?

A Yes, sir.

Q And did dispatch call anybody else to the scene?

A Yes, sir.

Q Do you recall who they were?

A There were several other officers dispatched.

Q Could one of the officers have been Rex Tipton?

A He was the investigator who I contacted.

Q Did he respond?

A Yes, sir, he did.

Q Was Agent Martin Spears there?

A Yes, sir.

Q What was his role?

A Agent Spears was our Evidence Custodian and he processes our scenes.

Q Did you assist him?

A No, sir.

Q You were just there to secure the scene?

A Yes, sir, I secure the scene and I insure that everything is done properly. I don't handle any evidence or secure or process any evidence.

Q And what were you told at the scene?

A By who?

Q By anyone there?

A Mr. Bell, one of the witnesses, made a statement to me that he observed Mr. Horne shoot Mr. Williams. Mr. Williams's wife made that statement to me at the scene.

Q Are you aware that Mr. Bell recanted that statement?

MR. SMITH: I object, Your Honor. He's not going to testify.

THE COURT: I sustain.

MR. NICKSON: Did you do a report with respect to what was said to you?

A As far as the statements?

Q Yes?

A No, sir, the investigator handles all the statements, I did the initial incident offense report and turned it over to him.

Q Who is Officer Ed Farren? (PHON)

A That's one of my patrol officers assigned to my shift.

Q What was his role?

A He was the second officer on the scene.

Q When did Lt. Rex Tipton show up?

A After the scene was secured and the victim was transported.

Q Had Agent Spears collected evidence and processed the scene at that time?

A I'm not sure, sir.

Q Did you go with Mr. Williams when he was transported?

A No, sir, I did not.

Q You remained at the scene?

A At the scene, yes, sir.

MR. NICKSON: Nothing further.

THE COURT: Thank you, sir. We appreciate you coming in.

SHANICE HORNE

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. SMITH:

Q Would you introduce yourself to the Jury, please?

A Shanice Horne.

Q Shanice Horne?

A Uh-huh.

Q And Gary Horne is your brother, is that correct?

A Uh-huh.

Q And you have a child with John Williams?

A Yes.

Q I'm going to ask you a few questions about what happened on the night of January the 15th of 2004, okay?

A Okay.

Q You were at your brother's house?

A Yes.

Q Do you remember what time of the evening that was? Were you there most of the day?

A No.

Q When did you arrive at your brother's house?

A I guess at 8:30.

Q That night?

A Yeah.

Q Dark?

A Yeah.

Q And John was there?

A Yes.

Q He was there when you arrived?

A Well, we met up because he had called my mom and told me to come over to my brother's.

Q So, you met him over at your brother's house?

A Uh-huh.

Q Was your son with you?

A Yes.

Q Your and John's son?

A Uh-huh.

Q Did Gary and John play video games together at Gary's house?

A Yeah.

Q At some point in time, John's wife came over, is that correct?

A Uh-huh.

Q Tell the Court what happened after she showed up? Did John try to leave?

A Yeah, he was trying to leave and then me and him got into it.

Q What happened when he tried to leave?

A I think we went to tussling each other and then I punched him.

Q You punched him?

A Uh-huh.

Q Was he trying to leave when you hit him?

A I think he was pushing me when I hit him.

Q So, you are now saying that he was pushing you?

A Yeah, we was tussling, you know.

Q Earlier when I asked you out in the hall, didn't you tell me that you punched him first?

A Yeah, I did hit him first.

Q You did hit him first?

A Yeah.

Q Then did ya'll get into an altercation where ya'll fell on the table?

A I think we kind of like fell on the table.

Q Is that when your brother got involved?

A Yes.

Q Now, after he got involved, John left Gary's house, is that right?

A Uh-huh.

Q Did you follow John and his wife back over to the Arrowhead Apartments?

A Yeah.

Q Did you block John's car into the parking space there at the Arrowhead Apartments?

A Uh-huh.

Q Why did you do that?

A Because it goes on all the time and I thought he was going to try to leave without getting through with the argument.

Q You wanted to finish the argument?

A Yeah.

Q What was this argument about?

A I was mad because his ex-wife came to my brother's house.

Q Okay. It was his wife that –

A At the time, yes.

Q You were mad because she came over?

A Uh-huh.

Q Did that make you mad while you were at Gary's house?

A Yeah.

Q Very mad?

A I was upset.

Q And then you followed them because you were still mad?

A No, he left and she followed him and then I followed.

Q You followed him?

A Yes.

Q Because you wanted to finish the argument?

A Yes.

Q Did you call Gary at any point in time?

A No, I don't have a cell phone.

Q So, you followed John on your own?

A Yeah.

Q Did you tell Gary why you were following him?

A No.

Q Did you feel like you needed him there to finish this argument?

A Who?

Q Your brother?

A No.

Q So, you came over and you blocked John's car?

A Yes.

Q Is that right?

A Yes.

Q At some point did you get out of your car before Gary arrived?

A (No response)

Q Was it before or after Gary arrived?

A I think it was a little afterwards.

Q After Gary arrived, that's when you got out of your car?

A Yes.

Q What did Gary do when he got out of his car?

A I think they was like fussing as they was walking to each other, so, I was getting out of my car to go across the street to call my mother.

Q You walked across the street?

A Yeah.

Q Were you ever between John and Gary at the Arrowhead Apartments?

A No.

Q You had walked across the street?

A Yes.

Q Got out of your car and walked across the street?

A Yes.

Q And you weren't in any danger at this point in time, were you?

A No.

Q Not at all?

A No.

Q And when you walked across the street and went to the apartments, what happened?

A I heard a gunshot and I turned around.

Q Okay. What did you see when you turned around?

A John on the floor.

Q John was on the ground?

A Uh-huh.

Q And what was your brother doing?

A He was gone, getting in his car.

Q Getting in his car?

A Yes.

Q Did you see him run to his car?

A I don't remember.

Q You don't remember –

A I don't remember if he was running or walking.

Q Did you see him going towards his car?

A Yeah.

Q You did?

A Yeah.

Q Have you and John ever had these kinds of fights before?

A Yes.

Q And you went there to finish this one, is that fair to say?

A Yeah.

Q You were pretty mad, weren't you?

A Yeah, I was mad.

Q Was your son in the car?

A Uh-huh.

Q So, John's son and your son was sitting in the car when his father was shot, is that right?

A Yes.

Q By himself?

A Yeah.

Q Did you go back over to where John was after he was shot?

A Uh-huh.

Q Did you see where he was shot?

A Uh-huh.

Q Where was he shot?

A Like on the side in his stomach.

Q On the side?

A Yes.

Q Okay.

MR. SMITH: That's all.

EXAMINATION

BY MR. NICKSON:

Q On the 15th you were at your brother's house?

A Yes.

Q And you were there with your son?

A Uh-huh.

Q Was Mr. Williams there as well?

A Yeah, I think we pulled up at the same time.

Q And you went in and do you know how long you stayed?

A Probably twenty minutes.

Q You stayed twenty minutes?

A About thirty minutes before it happened.

Q Before you left?

A Yeah.

Q Before all of ya'll left?

A Yeah, like probably thirty to forty-five minutes.

Q And you followed Mrs. Williams and Mr. Williams over to the Arrowhead Apartments?

A Yes.

Q And you were upset?

A Yes.

Q With him?

A Yes.

Q Were you upset because you were Mr. Williams's girlfriend?

A Uh-huh, because he always go back and forth.

Q Even though he was married?

A Yeah.

Q Did you have any discussions that day about your son?

A Well, we went to eat lunch with him together at school and we went to his aunt's and me and him got into a little argument there.

Q And was that the same day?

A Yes.

Q So, you were with Mr. Williams earlier that day?

A Uh-huh.

Q When Mrs. Williams came, did you call her to come over?

A Huh-uh.

Q Did you have an opportunity to go use Mr. Williams's phone?

A Huh-uh, I didn't use the phone.

Q Pardon?

A I didn't use the phone.

Q Were you with anybody that did?

A Uh-huh.

Q Who was that?

A Kesha.

Q Kesha?

A Yes.

Q Where did ya'll use the phone?

A In his car.

Q Mr. Williams's car?

A Yes.

Q I'm trying to understand why did you not want him to leave?

A Why did I want him to leave?

Q Why did you not want him to leave?

A John to leave?

Q Yes?

A Because he had called and told me to come over, so, I was mad and –

Q You said that you and Mr. Williams were tussling?

A Uh-huh.

Q As he was trying to leave?

A Yes.

Q But you hit him first?

A Yes.

Q After ya'll were tussling, did he hit you?

A No.

Q So, he just grabbed you and slammed you to the floor?

A I never hit the floor, he just pushed me.

Q He just pushed you?

A Yes.

Q Are you and Mr. Williams in a habit of getting into these little arguments?

A Yes.

Q Have you ever filed charges of domestic violence?

A Yeah, he's been arrested for it.

Q Do you know how many times?

A With me?

Q Yeah?

A I guess probably three or four.

Q Do you have any personal knowledge of him being arrested at any other times?

A For her.

Q For her?

A His ex-wife.

Q His ex-wife?

A Yeah.

Q Do you know how many?

A I don't know how many, a couple.

Q A couple?

A Yes.

Q So, you were sitting in the car?

A Yes.

Q Blocking Mr. Williams?

A Yes.

Q And when your brother pulled up, you got out?

A Yes.

Q And you went across the street to call your mother?

A Yes.

Q And at that point you couldn't see anything?

A Huh-uh, no.

Q Your back was to the situation?

A Yeah.

Q Then you heard a gunshot?

A Yes.

Q Then when you looked back, you saw that your brother was gone?

A Yes.

Q Did you see that he was gone, or, that he was leaving?

A Well, he was in the car ready to crank it up, I guess, and then he was gone.

It happened so quick.

Q So, he was already gone?

A Yeah.

Q And John was on the ground?

A Yeah.

Q And he had been shot?

A Uh-huh.

Q Did you see anybody going through Mr. Williams's pockets?

A Huh-uh.

Q Nobody went through his pockets?

A Not that I saw.

Q Before the ambulance arrived?

A Not that I saw.

Q And you didn't see who shot John?

A Huh-uh.

Q And you know Mr. Williams quite well?

A Yes.

Q Have you ever known Mr. Williams to be in possession of a handgun?

A I think he used to have one.

Q Have you ever known him to own any other guns?

A I don't remember, I don't think so.

Q Rifles or shotguns or sawed-off shotguns, or anything like that?

A Oh, he had a rifle.

Q A rifle?

A Yes, but I don't know what kind.

Q But you did know him to have a handgun?

A Uh-huh.

Q Do you know what kind of handgun?

A No.

Q Are you familiar with handguns?

A No.

Q So, you heard a gunshot?

A Yeah.

Q Do you know who had the gun?

A Huh-uh.

Q How long did your relationship with Mr. Williams go back?

A (No response)

Q Your child is –

A My child is fixing to be eight on Friday.

Q Eight years old?

A Yes.

Q So, you go back further than eight years?

A Well, yeah, ten, about ten years, since '96.

Q Do you have any personal knowledge with respect to Mr. Williams being arrested for anything else other than domestic violence?

MR. SMITH: I object.

THE COURT: I sustain.

MR. NICKSON: As you've said, you've had Mr. Williams arrested three or four times for domestic violence?

A Uh-huh.

Q Do you understand that your brother is accused of attempted murder?

A Yes.

Q Have you ever known your brother to own a gun?

A Not that I know of.

MR. NICKSON: Nothing further.

EXAMINATION

BY MR. SMITH:

Q You said this happened really fast?

A Yes.

Q In just seconds?

A Yes.

Q Less than a minute or two?

A Yeah.

Q Is that from the time you got out of the car and the time that you heard the gunshot?

A Yeah.

Q Okay. So, you didn't ask your brother to come over there?

A Huh-uh.

Q But he arrived?

A Yes.

Q And then seconds after he arrived, John was shot?

A Uh-huh.

MR. SMITH: That's all.

THE COURT: Thank you, ma'am, you can step down.

MR. SMITH: The State rests.

(The following occurred out of the presence of

(the Jury:

MR. SMITH: Your Honor, I was going to recall him just to have him state that these events occurred in Dale County.

MR. NICKSON: We'll stipulate to that. At this time I would like to ask the Court for a directed verdict with respect to the charges against Gary Horne. The State has failed to make a prima facie showing that he committed these crimes.

THE COURT: Motion denied.

MR. SMITH: I would renew my objection as to the State's failure to provide discovery with respect to Mr. Barr and I have not received it.

THE COURT: Motion denied.

MR. SMITH: I would respectfully move for a mistrial.

THE COURT: Motion for a mistrial denied.

(Whereupon, the Jury was returned for the
(following:

IMMOGENE PAUL

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. NICKSON:

Q State your name?

A Imogene Kesha Paul.

Q Are you employed?

A Yes.

Q Where?

A Westside Health & Rehab.

Q What do you do there?

A Nursing.

Q Do you recall the event that led to an argument in your home on the 15th of January of 2004?

A Yes, sir.

Q What happened?

A Well, we planned to have a nice night and Gary was like –

REPORTER: You need to speak up because they can't hear you over there at that end of the Jury.

A Okay. Gary said John was coming over to play a game and, when John got over there, he asked Gary if he had called and told Shanice to come over because he had to talk to her about something. Then they were playing the game and all and I asked John if I could use his phone. When I went out to his car to use his phone, I was just looking around and I got his cell phone out and me and Shanice sat down in my car and I used the phone. When I mashed the "send" button, I thought I had dialed my number in, but when I mashed the "send" button a lady answered the phone, so, I hung up. Then after that, I made the call I had to make and went back inside.

Q You went to Mr. Williams's vehicle to use his cell phone?

A To get his phone out of the car.

Q To get his phone out of the car?

A Yes.

Q Did you use the phone in the car or –

A I got it out of his car and went back to my car. We sat in my car to use his phone because Shanice wanted to copy some numbers out of his phone.

Q Do you know why she wanted to do that?

A I guess being nosey.

Q Because that's his girlfriend?

A Uh-huh.

Q While you were in Mr. Williams's vehicle getting the phone, did you happen to see anything else in his car?

A Yeah, he already knew he couldn't bring any guns into my house, but between the two seats there was the black end of a gun sticking down between the seats.

Q Was it a rifle or handgun?

A A handgun.

Q Do you recall what color it was?

A Black.

Q Black?

A Yes.

Q And you know for sure it was a gun?

A Uh-huh.

Q So, you used the phone?

A Yes.

Q And you let Shanice have it and she wrote down some numbers?

A Uh-huh.

Q Did you put it back and go back in the house?

A No, we just went in the house.

Q With the phone?

A With the phone.

Q What happened after that?

A We were just sitting down and then Gary had left to go pick up his friend Terrance and, when he came back, he like whispered something to John and John was like, "What?", and he was like, "Your folks is outside." So, John got up and he went outside and he came back in and he was like, "Which one of ya'll bitches called my wife?", and then I looked at Shanice and she looked at me because I didn't intend to call his wife, but when I mashed "send", a lady picked up the phone and I just hung up.

Q And you did that one time?

A Yes.

Q And that was by accident?

A Yes.

Q And you didn't say anything?

A No, I didn't say anything, I just hung up the phone.

Q And this phone doesn't indicate that whoever answered the phone was at your house?

A Do what?

Q The phone doesn't indicate, when the phone is answered, that the phone is at your house?

A No.

Q Continue.

A Well, after that –

Q Did you take the phone in the house?

A Yes.

Q Okay.

A And after all that happened with his wife coming over –

Q Where was she at this time?

A She was standing in my doorway.

Q Was the door open or closed?

A It was open because when John came in he left the door open and she stepped into my house.

Q She stepped in your house?

A Right, and then I told her she couldn't come out there and start fussing because I had my grandmother out there that I was taking care of and my kids and they don't witness stuff like that.

Q Did the door stay open?

A It did because she was standing there fussing with Shanice and Shanice

was fussing with John and telling him that he wasn't leaving and going no where with her. So, John walked by and he was – they were fussing. I think when he walked by that Shanice punched him and then he grabbed her and they started fighting in the kitchen. Me and Gary broke them up and we was like, "Ya'll got to leave, ya'll can't be doing this in here."

Q At any time did you see Mr. Williams hold Ms. Horne by the throat?

A Yes.

Q Where was that?

A In the kitchen.

Q Was that before or after Ms. Horne hit him?

A It was after. I think she hit him first.

Q Was Mr. Williams and Ms. Horne there with their son?

A Right.

Q Were they busy with the son or visiting together?

A They were visiting with the son and I think John wanted Shanice to come over there so he could see his son and just tell her that he didn't want nothing else to do with her.

Q Do you know if they got into any other arguments about the child or any other thing?

A Yeah, he asked her, "Don't my son have school tomorrow?", and she said, "Yeah, I'm just going to keep him home", and he was just looking at her like, "You're so stupid, that boy needs to be in school."

Q How long have you known Mr. John Williams?

A Years.

Q Years?

A Yes.

Q Is he a good law abiding citizen, in your opinion?

MR. SMITH: Objection.

THE COURT: I sustain.

MR. NICKSON: How long have you known Gary's sister?

A Years. I grew up here in Ozark.

Q Have you ever been present to observe behavior that you felt was abusive between Mr. Williams and Ms. Horne?

A Other than that night, no, only things I would hear.

Q Do you know if Mr. Williams and Ms. Horne have an ongoing relationship as boyfriend/girlfriend?

A Yes.

Q Even when Mr. Williams was married?

A Yes.

Q And you were present when this broke out?

A Yes, sir.

Q And this is when –

MR. SMITH: I object to leading the witness.

THE COURT: I overrule, go ahead.

MR. NICKSON: Ms. Williams came to your house?

A Yes.

Q And did she start anything, or, just –

A No, when she came in the house she started fussing and I looked at Gary and I said, “She can’t come out here like this”, and I told him he needed to say something to her and he was like –

Q So, this is very much a family affair at this point?

A Yes, sir.

Q And one that certainly got out of hand?

A Yes, sir.

Q Do you know how these people left your home?

A Yes, sir, after we told them they had to leave, John got in his car and when he got in he must have dropped something because he pulled off and then his wife pulled off behind him. Then Shanice pulled off. I was trying to tell Shanice she needed to go because she had her little boy and she was like, “No, I’m going anyway.” So, they all left together and then John came back and picked something up off the ground and then they all left again and they were just following each other in a line.

Q Do you know what happened after that?

A After that, they went over to John’s mama’s house.

Q How do you know that?

A Because that’s what they told me.

Q Did you have an opportunity to hear Mr. Horne's phone go off?

A Yes, sir.

Q How many times did it go off?

A A lot of times. The whole time it was going off, he was telling me that he didn't do anything and –

Q Every time that Mr. Horne's phone rang, did he answer it?

A Not every time.

Q Did he know who was calling?

A He did. After the first couple of times he answered and John was fussing and he asked me, "Did you have anything to do with this?", and I was like, "No", and then I told him I did dial a number on accident but I didn't know it was his wife. Then he told Gary, "I'm shooting you and if you don't hurry up and get over here by the time my mom gets home, I'm going to shoot this bitch in her head."

Q So, this was Mr. Williams saying that?

A Uh-huh.

Q Were you on the telephone?

A I wasn't on the phone, but he was screaming and I was standing right by Gary and he was screaming loud enough you could hear it through the phone.

Q So, you could hear all this?

A Uh-huh.

Q And you heard the threat to Mr. Horne's wife?

A Yes, sir.

Q And you heard Mr. Williams threaten to shoot his sister?

A Uh-huh.

Q And did you think that he might have the ability to do so?

A Yes, sir.

Q Is that because you saw the gun in the car that day?

A Not just because I saw a gun, but because I know that he would fight a woman.

Q So, you actually heard Mr. Williams say all this?

A Yes, sir.

Q Are you certain that the voice you heard was that of Mr. John Williams?

A Yes, sir.

Q It was that individual sitting over there?

A Yes, sir.

Q Did you actually hear Mr. Williams state to Gary that he needed to come get his sister before Mr. Williams shot her?

A Yes, sir.

Q To the best of your knowledge, does Gary own a gun?

A No.

Q Does he own a rifle?

A No, sir.

Q Do you believe that Mr. Williams would have ever caused Mr. Horne's sister any harm?

A Yes, sir.

Q Did you go with Mr. Horne that night?

A No, sir, I didn't.

Q Did anybody go with Mr. Horne that night?

A Terrance Barr did.

Q Did you stay there at your home?

A Yes, sir.

Q Why?

A Because my children were there and my grandmother.

Q How did you find out about what happened after Gary and Mr. Barr left to go to –

A I kept calling his phone. At first, he wouldn't answer, but when he finally called me back, I could just tell something was wrong and I was like, "What happened?", and he told me at first that him and John got into a fight. I kept saying, "What's wrong?", and finally he told me to just meet him somewhere and he was crying. So, I told him okay and then I called my mom and she came over and sat at the house with my kids.

Q How long did it take you to get to Mr. Horne?

A Like five minutes.

Q What happened after that?

A I sat down in the car where he was at and I asked him what was wrong and he told me that –

MR. SMITH: I object to the hearsay.

THE COURT: I sustain.

MR. NICKSON: You said you didn't go with Mr. Horne?

A No, sir.

Q Were you afraid for Mr. Horne's safety?

A Yes, sir.

Q And at no time did you see any other gun, other than the gun you believed you saw in Mr. Williams's car?

A Right.

Q Just the gun in Mr. Williams's car?

A Yes, sir.

Q And is it your belief that this gun would have been the gun involved in this accident?

MR. SMITH: I object to what she believes.

THE COURT: I sustain.

MR. NICKSON: That's all.

EXAMINATION

BY MR. SMITH:

Q Gary Horne is the father of your children, is that right?

A Yes, sir.

Q You are not his wife?

A No.

Q Doe she have a wife?

A I understand he's engaged to be married.

Q Engaged now?

A Uh-huh.

Q Was he engaged when you were dating him or living with him?

A No, sir.

Q Did you make a comment about Mr. Williams would fight a woman?

A Yes, sir.

Q Wouldn't Mr. Horne fight with a woman?

A He never hit me.

Q Never hit you?

A No.

Q Wasn't he charged with domestic violence against you?

A No, he was not charged with domestic violence. A neighbor did call the police because of an incident that happened at my house.

Q And he was charged with domestic violence against you, isn't that correct?

A No, he wasn't. I never pressed any charges against him and I never said he hit me.

Q Did he have to go to Court because he was charged with domestic violence against you?

A No – did you? I don't know.

Q Back in June of 2003 wasn't he charged with harassment against you?

A I don't know if he was or not. I didn't call the police and I didn't press no charges against him.

Q Okay.

A He didn't hit me and –

MR. NICKSON: Your Honor, I object to this.

THE COURT: I sustain.

MR. SMITH: Let me ask you about that night. You said that you were afraid for Gary Horne's safety?

A Right.

Q Did you tell him not to go?

A I told him not to get in the middle of it.

Q You told him not to go?

A I gave him my opinion.

Q When did you call the police about the altercation that happened at your house?

A When did I call them?

Q Did you call them?

A No, I didn't.

Q All this stuff happened at your house and you didn't call the police?

A No, I didn't. I would hate for my kids to see the police come over because of something that someone was doing.

Q What do you not want them to see?

A The fighting and the police coming over.

Q Did Gary call the police?

A No, he didn't.

Q When he was getting these threats on the telephone, did you call the police?

A No, sir.

Q Did Gary Horne call the police and tell them his sister was being threatened by John Williams?

A No, he didn't.

Q Gary was mad at you that night about the phone calls, wasn't he?

A Uh-huh, he asked me why would I get in the middle of their mess.

Q Who told Shanice she had to leave?

A We both did.

Q You told them to get out of the house?

A That's right.

Q And you used Mr. William's phone in your car?

A Yes, I went to his car to get the phone, then I got in my car.

MR. SMITH: That's all.

JOHN DASSINGER

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. NICKSON:

Q State your name?

A John Dassinger.

Q Speak up. Where do you reside?

A In Arton right now.

Q Where are you employed?

A Right now I'm currently not employed. I was working with Terminex, but I'm not any more.

Q Do you know the Defendant Gary Horne?

A I do now.

Q Are you familiar with what Mr. Horne is charged with here today?

A Yes, sir.

Q Do you personally know the victim Mr. Williams?

A Yes, sir.

Q How long have you known him?

A Quite a while.

Q Quite a while?

A Yes, sir.

Q Could you define "quite a while"?

A A few years.

Q Did you have an occasion to speak to Mr. Williams or procure anything from Mr. Williams after January the 15th of 2004?

A I bought a pistol from him in late January.

Q Do you remember what kind of pistol it was?

A A Glock-40.

Q Do you know where the gun is now?

A The police have it.

Q Okay.

A I got pulled over and they took it from me.

Q Where did you get this gun?

A From John-John Williams.

Q Pardon?

A From John-John Williams.

Q And did you but it or did he give it to you?

A Yes, sir, I bought it.

Q And how much did you pay for the gun?

A A hundred bucks.

Q And this was after the 15th or 16th of January?

A It was late January.

Q Sir?

A Late January.

Q Did Mr. Williams tell you anything about the firearm?

A No.

Q Had you ever tried to buy this firearm from him before?

A I tried to buy it a couple of times before and he wouldn't sell it to me.

Q Do you know why?

A He said he didn't want to get rid of it.

Q And you say that the police took the gun from you?

A Yes, sir.

Q Were you charged with having a firearm?

A Yes, sir.

Q So, the police should still have this gun?

A They should.

Q When you bought this handgun, was anybody with you?

A Huh-uh.

Q Was it the Dale County law enforcement that got the gun?

A Yes, sir, it was Ozark.

Q Ozark?

A Yes, sir.

Q Was there anything unusual about this gun?

A No.

Q Were you charged with having this gun?

A I was charged with having a pistol without a permit, and then they tried to change the charges and say I had a pistol with altered serial numbers.

Q Okay.

A I don't know what they're trying to charge me with now.

Q But you no longer have the gun?

A No.

Q And you did purchase this gun from Mr. Williams?

A Yes, sir.

Q And it was a .40 caliber Glock?

A Yes, sir.

Q Have you ever known Mr. Williams to have any other guns?

A Yes, sir.

Q Do you know what kind?

A I've just seen flashes of them here and there.

Q When you say "flashes", do you –

A I mean like I would see one laying in the seat, you know, or laying in the floorboard or I would see it through his shirt on the side right here.

Q He held it in his waistband?

A Yes, sir.

Q And you have known him for several years?

A Yes, sir.

Q And he would always carry a firearm?

A As far as I know.

MR. SMITH: He keeps leading this witness, Your Honor, and I object.

MR. NICKSON: Nothing further.

EXAMINATION

BY MR. SMITH:

Q Mr. Dassinger, you say you are not sure about what you are charged with?

A I know that I was charged at first with receiving a pistol without a permit, and then they tried to change it to pistol with altered serial numbers. The serial

numbers weren't altered because I checked them myself and they matched on the clip and on the pistol itself.

Q Weren't you indicted for possessing a pistol with – possession of an altered pistol?

A That's the second charge they tried to get me on.

Q Aren't you indicted also for possession of a controlled substance?

A Yes, sir.

Q And possession of marijuana?

A Yes, sir.

Q Did you plead guilty to those charges?

A Yes, sir.

Q Didn't you at one point in time tell someone in law enforcement that you found this firearm?

A No, sir, I told them that I found the drugs.

Q You didn't say you found the firearm?

A No.

Q So, you told them you found the drugs?

A Yes, sir.

Q When did you purchase this gun?

A Late January.

Q Like how late in January?

A Like towards the end of January.

Q Was it the last day of January?

A I'm not exactly sure of the date, but I know it was towards the end of January.

Q Towards the end of January?

A Yes, sir.

Q Conveniently shortly after he was shot, correct?

A Yeah, I guess so.

Q Now, let me ask you this. Where did you purchase this gun?

A At his mother's house?

Q At his mother's house?

A Well, I used to stay like four or five doors down from his mother and we had got kicked out of the apartments, then I stayed at a friend's house that lived in those same apartments and –

Q What are their names?

A Justin, Ricky and a few people over there I know.

Q Are you friends with Gary Horne?

A I am now, I guess you could say.

Q You are now?

A Yeah, I didn't really know him on a personal level until all this got started.

Q Did you know that Gary Horne was charged with attempted murder against John Williams?

A Not until all this started.

Q Not until all this started?

A Not until I got caught with the pistol.

Q You weren't concerned about – you didn't think, "Oh my goodness, he was shot, and Gary is charged with it. Maybe I should take this gun to the police"?

A No.

Q That's didn't cross your mind, did it?

A No.

Q None of this crossed your mind until you were arrested February the 5th?

A Yes.

Q That's when you started coming up with this story about John Williams and buying the gun from him? That's when this all started to come out, isn't that right, after you were already charged with having an altered weapon?

A Say that again?

Q You didn't go tell the police about this gun before you were arrested, did you?

A No, sir.

Q Your testimony is that you never told anybody that you found this gun?

A I told them that I had found the drugs that I had, but they never really asked me where I got the pistol.

Q Where did you find these drugs?

A I told them that I found them at a guy's house that I have a problem with.

Q Okay.

A But I didn't want to tell them where I got it.

Q So, did you steal them from that person?

A The person wasn't there.

Q Wasn't there?

A No.

Q Did this person tell you that you could take his drugs?

A No.

Q So, you stole his drugs, right?

A I guess you could say that.

Q And you now say that you didn't take the gun from that person?

A I told them then I didn't.

Q Okay.

A The pistol I had was not stolen.

Q What you told them about the drugs was just a fraud, wasn't it?

A At the time.

Q You were trying to deceive the law enforcement officers as to where these drugs came from?

A Yeah.

MR. SMITH: That's all.

EXAMINATION

BY MR. NICKSON:

Q Mr. Dassenger, did you tell the law enforcement that you had purchased

the gun?

A No, sir, they never asked.

Q Did you tell them that you were the owner of the gun?

A No, they didn't ask that either.

Q So, the officer –

A The officer asked me if I had anything in the vehicle and I told him there was a Glock-40 beside the seat. I didn't try to hide it from him or nothing, you know. He went in and got the pistol out and then they continued to search and never found anything else but a little piece of paper folded up that had a little bit of marijuana in it and it was beside the passenger's seat where a friend of mine was sitting.

Q Okay.

A Then he continued to search and he had us outside the vehicle and I had some crystal meth in a jacket pocket and I had passed the jacket to my friend and he passed it back and the police officer searched it a couple of times and never found it until the end after he searched it about three times.

Q Were you convicted of being in possession of an altered firearm?

A Yes, sir.

Q Of an altered firearm?

A Well, I wasn't convicted of it. They tried to say that the serial numbers were altered. When they called it in on the radio, they called it in as a Glock-19, and the lady on the radio corrected the officer and said it wasn't a Glock-19, but that it was a Glock-40, and there was negatives 27's on the pistol.

Q What is a negative 27?

A I'm thinking warrants or no stolen pistol, to the best of my knowledge.

Q Did you tell the officer that you had purchased the gun then?

A No.

Q When you say "late January", was it before the first day of February?

A It had to have been because I had it a couple of weeks before I got caught with it and I got caught with it in February.

Q And there are 31 days in January?

A Yes.

Q So, that would probably have put it past the 16th or 17th of January??

A It had to have been because I only had the gun a short period of time.

Q And the law enforcement never asked you where you got it?

A No, they didn't. They asked me where I got the drugs, but they never asked me where I got the pistol from.

Q It's your testimony here today that you bought it from Mr. John Williams?

A Yes, sir.

Q And he wasn't willing to get rid of the firearm prior to that time?

A Right.

Q And then he sold it to you for a hundred dollars?

A Yes, he asked me if I still wanted it and I told him yeah.

Q So, he offered it to you?

A Yes, sir.

Q Did you have any idea about the events that transpired at the Arrowhead Apartments prior to purchasing the gun?

A Not until probably a couple of days after I had purchased it because we had already moved out of the apartments and we were staying in the trailer in Ariton. I didn't have a phone at the time, so, I didn't really have contact with any of my friends. It took me coming to Ozark to visit people, you know, before I started hearing about it.

Q Do you recall when I inquired about this gun?

A You?

Q When I did?

A I don't remember the date, but it was when the case started happening.

Q Your case?

A Mr. Horne's case.

Q So, it was after he was indicted?

A Yes, sir.

Q Did I talk directly to you or to your attorney?

A To me.

Q I talked directly to you?

A Yes, sir.

Q Did you have an attorney at the time?

A No, my attorney was court appointed.

Q Didn't you have a female attorney prior to that occasion?

A Yeah, yeah, yeah, that's right. I lost my attorney because I couldn't pay for her.

MR. NICKSON: That's all.

EXAMINATION

BY MR. SMITH:

Q What was Mr. Williams doing when you bought this gun?

A Sitting outside his mother's house.

Q Just sitting in a chair?

A Yes, sir.

Q Outside of his mother's house?

A Yes, sir.

Q Was he working at that time?

A No.

Q Did you go over to his house?

A I seen him outside and he told me to come here and asked me if I still wanted to get it.

MR. SMITH: That's all.

MR. NICKSON: We rest.

THE COURT: Does the State have anything else?

MR. SMITH: We call Tim Hicks.

TIM HICKS

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. SMITH:

Q State your name, please?

A I am Sgt. Tim Hicks with the Ozark Police Department.

Q And you work with the Violent Crime Drug Task Force?

A Yes, sir.

Q I'll try to be brief. Were you involved in a traffic stop of John Williams Dassinger back in February of last year?

A Yes, sir, I was called to the stop after the stop was made and the evidence was found and recovered.

Q What evidence was found on Mr. Dassinger?

A He had a container containing meth, a piece of notebook paper containing marijuana, \$650.00, and a Glock pistol was recovered out of the vehicle.

Q Did Mr. Dassenger make any statements as to the source or where he obtained the pistol?

A He stated that he found it.

Q Did he also say that about the drugs?

A Yes, sir.

Q He said he found all of it?

A Yes, sir.

MR. SMITH: That's all.

MR. NICKSON: No questions.

(Overnight recess was held, following which

(the following occurred the next morning

(at 9:00 a.m. out of the hearing of the Jury:

THE COURT: Eddie Henderson and Terrance Barr are here if you want to talk to them in private or if you want to put them on the stand and ask them questions, either outside the presence of the jury or if you want to reopen your case and use them as witnesses, just whatever you want to do.

MR. NICKSON: Your Honor, the case agent in this matter I thought was going to be here. I did subpoena him and he was no where to be found yesterday. Mr. Adams told me Monday that he would be here Wednesday. Quite frankly, I need the case agent and he's the individual that found the bullet in the matter.

THE COURT: All I'm interested in now is what you're going to do with Mr. Henderson and Mr. Barr.

MR. SMITH: That wasn't brought up before he closed his case, Your Honor.

THE COURT: In other words, if Eddie (Henderson) and Mr. Barr hadn't showed up, we would be arguing the case to the Jury right now. But we found them and I wanted to make sure that you knew they were found and they are here and you can use them any way you want to use them.

MR. NICKSON: Like I said, I thought that Mr. Tipton would not be here till Wednesday. He was not here yesterday, I was told that he would –

THE COURT: Well, this is the first I've heard of this after both sides have rested.

MR. NICKSON: Well, Your Honor, I have subpoenaed him every time and he testified –

THE COURT: Where I am now, you can get all of this in the Record and what you want to do with Eddie (Hendersosn) and Mr. Barr. Mr. Tipton – well, he's not with the City any more, is he?

MR. SMITH: No, he's moved to Mississippi.

THE COURT: He's moved to Mississippi?

MR. SMITH: Yes, Your Honor.

MR. NICKSON: Your Honor, like I said, I was told by Mr. Adams that he would be here today.

THE COURT: Have you talked to him?

MR. SMITH: I understand that he could be here today, but we did not – I was not under the impression that he was going to be here today.

MR. NICKSON: Well, I had a subpoena just in case.

THE COURT: What do you want to do with Mr. Henderson and Mr. Barr?

REPORTER: Mr. Henderson is here and down in the law library.

MR. SMITH: And Mr. Barr is here in the courtroom.

MR. NICKSON: Let me talk to the individuals off the record.

THE COURT: Mr. Barr, the lawyer for the Defendant wants to talk to you. You can put him on the stand outside the presence of the Jury or reopen your case and let him testify in Court if you want to. Mr. Henderson is back there in the library and you can talk to him too.

(A brief recess was taken, following which the
(following occurred:

MR. NICKSON: I've checked with Mr. Barr and he assures me that nothing adverse happened and I am satisfied.

THE COURT: So, you're not going to put him on the stand?

MR. NICKSON: No, Your Honor.

THE COURT: Okay.

MR. HENDERSON: Am I released?

THE COURT: Right.

MR. HENDERSON: Thank you, Your Honor.

(Whereupon, Court was recessed for the night,
(following which the following occurred after
(the Jury left the courtroom:

THE COURT: Do you have any written requested charged?

MR. NICKSON: No, just basically self defense, if it please the Court.

THE COURT: Everyone be back in the morning and we'll finish the case up. Thank you.

Q And you say that the police took the gun from you?

A Yes, sir.

Q Were you charged with having a firearm?

A Yes, sir.

Q So, the police should still have this gun?

A They should.

Q When you bought this handgun, was anybody with you?

A Huh-uh.

Q Was it the Dale County law enforcement that got the gun?

A Yes, sir, it was Ozark.

Q Ozark?

A Yes, sir.

Q Was there anything unusual about this gun?

A No.

Q Were you charged with having this gun?

A I was charged with having a pistol without a permit, and then they tried to change the charges and say I had a pistol with altered serial numbers.

Q Okay.

A I don't know what they're trying to charge me with now.

Q But you no longer have the gun?

A No.

Q And you did purchase this gun from Mr. Williams?

A Yes, sir.

Q And it was a .40 caliber Glock?

A Yes, sir.

Q Have you ever known Mr. Williams to have any other guns?

A Yes, sir.

Q Do you know what kind?

A I've just seen flashes of them here and there.

Q When you say "flashes", do you –

A I mean like I would see one laying in the seat, you know, or laying in the floorboard or I would see it through his shirt on the side right here.

Q He held it in his waistband?

A Yes, sir.

Q And you have known him for several years?

A Yes, sir.

Q And he would always carry a firearm?

A As far as I know.

MR. SMITH: He keeps leading this witness, Your Honor, and I object.

MR. NICKSON: Nothing further.

EXAMINATION

BY MR. SMITH:

Q Mr. Dassinger, you say you are not sure about what you are charged with?

A I know that I was charged at first with receiving a pistol without a permit, and then they tried to change it to pistol with altered serial numbers. The serial

numbers weren't altered because I checked them myself and they matched on the clip and on the pistol itself.

Q Weren't you indicted for possessing a pistol with – possession of an altered pistol?

A That's the second charge they tried to get me on.

Q Aren't you indicted also for possession of a controlled substance?

A Yes, sir.

Q And possession of marijuana?

A Yes, sir.

Q Did you plead guilty to those charges?

A Yes, sir.

Q Didn't you at one point in time tell someone in law enforcement that you found this firearm?

A No, sir, I told them that I found the drugs.

Q You didn't say you found the firearm?

A No.

Q So, you told them you found the drugs?

A Yes, sir.

Q When did you purchase this gun?

A Late January.

Q Like how late in January?

A Like towards the end of January.

Q Was it the last day of January?

A I'm not exactly sure of the date, but I know it was towards the end of January.

Q Towards the end of January?

A Yes, sir.

Q Conveniently shortly after he was shot, correct?

A Yeah, I guess so.

Q Now, let me ask you this. Where did you purchase this gun?

A At his mother's house?

Q At his mother's house?

A Well, I used to stay like four or five doors down from his mother and we had got kicked out of the apartments, then I stayed at a friend's house that lived in those same apartments and –

Q What are their names?

A Justin, Ricky and a few people over there I know.

Q Are you friends with Gary Horne?

A I am now, I guess you could say.

Q You are now?

A Yeah, I didn't really know him on a personal level until all this got started.

Q Did you know that Gary Horne was charged with attempted murder against John Williams?

A Not until all this started.

Q Not until all this started?

A Not until I got caught with the pistol.

Q You weren't concerned about – you didn't think, "Oh my goodness, he was shot, and Gary is charged with it. Maybe I should take this gun to the police"?

A No.

Q That's didn't cross your mind, did it?

A No.

Q None of this crossed your mind until you were arrested February the 5th?

A Yes.

Q That's when you started coming up with this story about John Williams and buying the gun from him? That's when this all started to come out, isn't that right, after you were already charged with having an altered weapon?

A Say that again?

Q You didn't go tell the police about this gun before you were arrested, did you?

A No, sir.

Q Your testimony is that you never told anybody that you found this gun?

A I told them that I had found the drugs that I had, but they never really asked me where I got the pistol.

Q Where did you find these drugs?

A I told them that I found them at a guy's house that I have a problem with.

Q Okay.

A But I didn't want to tell them where I got it.

Q So, did you steal them from that person?

A The person wasn't there.

Q Wasn't there?

A No.

Q Did this person tell you that you could take his drugs?

A No.

Q So, you stole his drugs, right?

A I guess you could say that.

Q And you now say that you didn't take the gun from that person?

A I told them then I didn't.

Q Okay.

A The pistol I had was not stolen.

Q What you told them about the drugs was just a fraud, wasn't it?

A At the time.

Q You were trying to deceive the law enforcement officers as to where these drugs came from?

A Yeah.

MR. SMITH: That's all.

EXAMINATION

BY MR. NICKSON:

Q Mr. Dassenger, did you tell the law enforcement that you had purchased

the gun?

A No, sir, they never asked.

Q Did you tell them that you were the owner of the gun?

A No, they didn't ask that either.

Q So, the officer –

A The officer asked me if I had anything in the vehicle and I told him there was a Glock-40 beside the seat. I didn't try to hide it from him or nothing, you know. He went in and got the pistol out and then they continued to search and never found anything else but a little piece of paper folded up that had a little bit of marijuana in it and it was beside the passenger's seat where a friend of mine was sitting.

Q Okay.

A Then he continued to search and he had us outside the vehicle and I had some crystal meth in a jacket pocket and I had passed the jacket to my friend and he passed it back and the police officer searched it a couple of times and never found it until the end after he searched it about three times.

Q Were you convicted of being in possession of an altered firearm?

A Yes, sir.

Q Of an altered firearm?

A Well, I wasn't convicted of it. They tried to say that the serial numbers were altered. When they called it in on the radio, they called it in as a Glock-19, and the lady on the radio corrected the officer and said it wasn't a Glock-19, but that it was a Glock-40, and there was negatives 27's on the pistol.

Q What is a negative 27?

A I'm thinking warrants or no stolen pistol, to the best of my knowledge.

Q Did you tell the officer that you had purchased the gun then?

A No.

Q When you say "late January", was it before the first day of February?

A It had to have been because I had it a couple of weeks before I got caught with it and I got caught with it in February.

Q And there are 31 days in January?

A Yes.

Q So, that would probably have put it past the 16th or 17th of January??

A It had to have been because I only had the gun a short period of time.

Q And the law enforcement never asked you where you got it?

A No, they didn't. They asked me where I got the drugs, but they never asked me where I got the pistol from.

Q It's your testimony here today that you bought it from Mr. John Williams?

A Yes, sir.

Q And he wasn't willing to get rid of the firearm prior to that time?

A Right.

Q And then he sold it to you for a hundred dollars?

A Yes, he asked me if I still wanted it and I told him yeah.

Q So, he offered it to you?

A Yes, sir.

Q Did you have any idea about the events that transpired at the Arrowhead Apartments prior to purchasing the gun?

A Not until probably a couple of days after I had purchased it because we had already moved out of the apartments and we were staying in the trailer in Ariton. I didn't have a phone at the time, so, I didn't really have contact with any of my friends. It took me coming to Ozark to visit people, you know, before I started hearing about it.

Q Do you recall when I inquired about this gun?

A You?

Q When I did?

A I don't remember the date, but it was when the case started happening.

Q Your case?

A Mr. Horne's case.

Q So, it was after he was indicted?

A Yes, sir.

Q Did I talk directly to you or to your attorney?

A To me.

Q I talked directly to you?

A Yes, sir.

Q Did you have an attorney at the time?

A No, my attorney was court appointed.

Q Didn't you have a female attorney prior to that occasion?

A Yeah, yeah, yeah, that's right. I lost my attorney because I couldn't pay for her.

MR. NICKSON: That's all.

EXAMINATION

BY MR. SMITH:

Q What was Mr. Williams doing when you bought this gun?

A Sitting outside his mother's house.

Q Just sitting in a chair?

A Yes, sir.

Q Outside of his mother's house?

A Yes, sir.

Q Was he working at that time?

A No.

Q Did you go over to his house?

A I seen him outside and he told me to come here and asked me if I still wanted to get it.

MR. SMITH: That's all.

MR. NICKSON: We rest.

THE COURT: Does the State have anything else?

MR. SMITH: We call Tim Hicks.

TIM HICKS

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. SMITH:

Q State your name, please?

A I am Sgt. Tim Hicks with the Ozark Police Department.

Q And you work with the Violent Crime Drug Task Force?

A Yes, sir.

Q I'll try to be brief. Were you involved in a traffic stop of John Williams Dassinger back in February of last year?

A Yes, sir, I was called to the stop after the stop was made and the evidence was found and recovered.

Q What evidence was found on Mr. Dassinger?

A He had a container containing meth, a piece of notebook paper containing marijuana, \$650.00, and a Glock pistol was recovered out of the vehicle.

Q Did Mr. Dassenger make any statements as to the source or where he obtained the pistol?

A He stated that he found it.

Q Did he also say that about the drugs?

A Yes, sir.

Q He said he found all of it?

A Yes, sir.

MR. SMITH: That's all.

MR. NICKSON: No questions.

(Overnight recess was held, following which

(the following occurred the next morning

(at 9:00 a.m. out of the hearing of the Jury:

THE COURT: Eddie Henderson and Terrance Barr are here if you want to talk to them in private or if you want to put them on the stand and ask them questions, either outside the presence of the jury or if you want to reopen your case and use them as witnesses, just whatever you want to do.

MR. NICKSON: Your Honor, the case agent in this matter I thought was going to be here. I did subpoena him and he was no where to be found yesterday. Mr. Adams told me Monday that he would be here Wednesday. Quite frankly, I need the case agent and he's the individual that found the bullet in the matter.

THE COURT: All I'm interested in now is what you're going to do with Mr. Henderson and Mr. Barr.

MR. SMITH: That wasn't brought up before he closed his case, Your Honor.

THE COURT: In other words, if Eddie (Henderson) and Mr. Barr hadn't showed up, we would be arguing the case to the Jury right now. But we found them and I wanted to make sure that you knew they were found and they are here and you can use them any way you want to use them.

COURT OF CRIMINAL APPEALS NO. CR 04-2461

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF DALE COUNTY, ALABAMA

CIRCUIT COURT NO. CC -2004-122

CIRCUIT JUDGE P.B. McLAUCHLIN, JR.

Type of Conviction / Order Appealed From: ASSAULT II

Sentence Imposed: 22 YEARS

Defendant Indigent: ☒ YES ☐ NO

GARY HORNE

HON JOSEPH GALLO 334-598-6200

NAME OF APPELLANT

(Appellant's Attorney) 451 N. DALEVILLE AVE STE 105 (Telephone No.)

(Address) DALEVILLE AL 36322
(City) (State) (Zip Code)

V.

STATE OF ALABAMA

NAME OF APPELLEE

(State represented by Attorney General)

NOTE: If municipal appeal, indicate above, and enter name and address of municipal attorney below.

(For Court of Criminal Appeals Use Only)



INDEX:

DEF'S EXHIBIT'S

EXHIBIT # 1 STATEMENT ----- 1

July 13, 2005

From: Sweet Tots Home Day Care
246 Dixie Drive
Ozark, Al. 36360

Dx-1

Re: Gary Horne

I'm sending this statement because due to day care (Group Home) I wasn't able to attend court.

I've known Gary Horne for 5 years. He had children in my day care for up until 6 weeks ago. The reason for the change was because I did not have space for the older child. He has a great relationship with his kids and they adore him. He provides for them. They were very neat and clean children with great manner. Gary had his oldest enrolled in city soccer and basketball. Geona was in dance (Dance Dimensions) with her first recital last year. We still keep in touch because I enjoy the whole family.

Gary has always shown me respect. When ask to be God Parents to his children made me fill good. My daughter babysit the kids when he and Keisha go to the movies and to dinner they are always back around 11:30 p.m. Gary has always attended to the needs of his family.

If I found out that Gary had been in trouble before, such knowledge would not affect my high opinion of him.

Linda Roberson



COURT OF CRIMINAL APPEALS NO. CR04-2461

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF DALE COUNTY, ALABAMA

CIRCUIT COURT NO. CC -2004-122

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GARY HORNE

HON JOSEPH GALLO 334-598-6200

NAME OF APPELLANT

(Appellant's Attorney)
451 N. DALEVILLE AVE STE 105 (Telephone No.)

(Address)
DALEVILLE AL 36322
(City) (State) (Zip Code)

V.

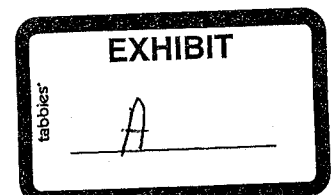
STATE OF ALABAMA

NAME OF APPELLEE

(State represented by Attorney General)

NOTE: If municipal appeal, indicate above, and enter
name and address of municipal attorney below.

(For Court of Criminal Appeals Use Only)



INDEX:

STATE'S EXHIBIT'S

EXHIBIT # 1 SENTENCE ORDER -----	01 - 03
EXHIBIT # 2 CASE ACTION SUMMARY -----	04

IN THE CIRCUIT COURT OF PIKE COUNTY, ALABAMA

STATE OF ALABAMA,

PLAINTIFF,

VS.

GARY HORNE,

DEFENDANT.

Case No.: CC 94-169

9X-1

S E N T E N C E O R D E R

Defendant, GARY HORNE, appeared before the Court and was represented by KEITH WATKINS, Attorney at Law. The State was represented by JOEL FOLMAR, DISTRICT ATTORNEY for the Twelfth Judicial Circuit, State of Alabama.

At Defendant's request, the Defendant was allowed to withdraw Defendant's earlier plea and to be re-arraigned.

On arraignment, Defendant entered a plea of GUILTY to HINDERING PROSECUTION, FIRST DEGREE in violation of Title 13A-10-43 of the Code of Alabama, 1975, as charged in the indictment.

The Court conducted a colloquy with the Defendant and did ascertain that the Defendant made a knowledgeable, intelligent and voluntary plea and that a factual basis exist sufficient to substantiate said plea.

Defendant is pronounced and declared GUILTY of HINDERING PROSECUTION, FIRST DEGREE in violation of Title 13A-10-43 of the Code of Alabama, 1975, against the peace and dignity of the State of Alabama.

Defendant was then:

- (1) Afforded an opportunity to make a statement in Defendant's own behalf before sentencing and was further asked if Defendant has anything to say as to why the sentence of the law should not be imposed;
- (2) Given an opportunity to present evidence as to any matter probative in the issue of sentence and/or facts in mitigation of any penalty that is to be imposed.

The State was then afforded an opportunity to present evidence as to any matter probative to the issue of sentence and/or facts in aggravation or mitigation of any penalty that is to be imposed.

After considering the arguments of the parties and any evidence presented:

IT IS ORDERED that for Defendant's conviction of HINDERING PROSECUTION, FIRST DEGREE, GARY HORNE is hereby sentenced to serve ONE (1) YEAR AND ONE (1) DAY in the PENITENTIARY, STATE OF ALABAMA.

The sentence imposed in CC 94-169 is **ORDERED** to run CONCURRENT with the sentence imposed in the case pending in Dale County, Alabama.

Defendant is given credit for any time the Defendant has already served while awaiting trial and/or disposition in this case. The Defendant is given jail credit for time served.

As an additional part of Defendant's sentence, the Defendant is hereby **ORDERED** to pay to the Circuit Clerk of the

Court the costs of Court, the Defendant is ORDERED to pay \$50.00 to the Clerk of the Court, which sum is to be distributed by the Clerk to the Alabama Crime Victims Compensation Commission and is ORDERED to reimburse the State for any attorney fees the State is caused to pay out due to the Defendant's representation herein.

The payment of the above is to be made in the heretofore listed order and is to be made a condition of probation, parole or other early release. The payment of the above amounts shall be made within of the date of this Court order.

Should the Defendant have any income while incarcerated in an Alabama Penitentiary or Correctional Facility, the Alabama Department of Corrections is ORDERED to pay twenty-five percent (25%) of Defendants said funds (which funds of the Defendant the Department may come into possession of) to the Clerk of the Court, Pike County, Alabama, as is allowed by law and said Department is ordered to pay same to the Clerk of the Court until such time as all restitution, costs, and above ordered fees are paid in full.

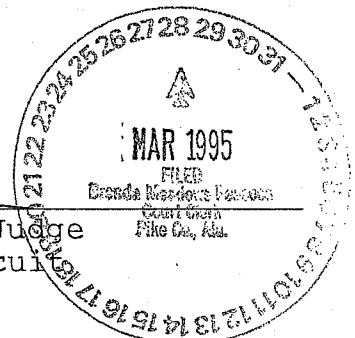
Defendant was advised of Defendant's right to appeal, as long as the Defendant perfects Defendant's appeal within a specified time; of his rights, if declared indigent, to a free transcript for the purpose of pursuing any appeal and of his right to Court appointed legal representation, along with Defendant's other appeal rights incident thereto.

Done this the 24th of March, 1995.

I Brenda Meadows Peacock, Clerk & Register of the Circuit Court for Pike County, Alabama, do hereby certify that the foregoing is a true and correct copy of the original documents in the above stated case, which is on file and enrolled in my office. Witness my hand and seal this the 13 day of July, 2008.

Brenda M. Peacock

Robert W. Barr
ROBERT W. BARR, Circuit Judge
Eleventh Judicial Circuit
State of Alabama



State of Alabama Unified Judicial System Temporary Form C-6 (1) Rev 9/90		CIRCUIT CRIMINAL CASE ACTION SUMMARY				Case Number CC- 95-194 Judge ID CLW	
IN THE CIRCUIT COURT OF <u>Dale</u> COUNTY IN THE _____ DIVISION							
<input checked="" type="checkbox"/> STATE OF ALABAMA <input type="checkbox"/> City of <u>Gary Home</u>				Distinguishing Features:			
Defendant		Address		SSAN			
				Sex	Race	DOB	Eyes	Hair	Height	Weight
Case Number		<input type="checkbox"/> Jury <input type="checkbox"/> Non Jury	Date Arrested	<input type="checkbox"/> Incarcerated <input type="checkbox"/> On Bond	Date Warrant/Capias Issued		Date Committed to Jail
Charges <input type="checkbox"/> Misdemeanor <input type="checkbox"/> Municipal Ordinance Violation <input type="checkbox"/> Felony <input type="checkbox"/> Appeal		Date Filed	Judge ID	Date Released on Bond		Bond Amount	
Prosecutor		Grand Jury Number		Date Preliminary Hearing		Bond Type & Sureties	
Attorney(s)		Date of indictment		Date of Trial		Verdict <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty	
Defendant's Signature <u>Mary Ablesworth</u>		Date Adjudicated		Sentencing Date		Court Reporter	
Additional Information and/or Remarks REGISTER-CLERK Circuit Court, Dale County, AL		<input type="checkbox"/> Official <input type="checkbox"/> Rover <input type="checkbox"/> Special		Date Transferred to Administrative Docket		<input type="checkbox"/> Official <input type="checkbox"/> Rover <input type="checkbox"/> Special	
Disposition Data		By Trial <input type="checkbox"/> Capital Jury <input type="checkbox"/> Jury <input type="checkbox"/> Non Jury		All Other <input type="checkbox"/> Plea <input type="checkbox"/> Other		Date Adjudicated	
DATE	ACTIONS, JUDGMENTS, CASE NOTES						
5-24-95	Explanation of Rights & Plea of Guilt A/I and Plea Bargain Agreement filed.						
5-24-95	State reduces charge of Robbery - 1 st Degree to Robbery - 2 nd Degree. Def. pleads guilty to reduced charge. Court finds & adjs. Def. guilty & sentences Def. to 5 yrs. in st. pen; sentence to run concurrent with CC-94-169 in Pike Co. Def. to pay cc & \$50.00 VCF.-CLW. cy: DA/Newman						
9-14-98	Promise to pay signed.						

Original = Court

Forward Pink Copy to AOC upon Disposition

COURT OF CRIMINAL APPEALS NO. CR-04-2461

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF DALE COUNTY, ALABAMA

CIRCUIT COURT NO. CC-2004-122

CIRCUIT JUDGE HON. P.B. MCLAUCHLIN, JR.

Type of Conviction / Order Appealed From: ASSAULT II

Sentence Imposed: 22 YEARS

Defendant Indigent: ☐ YES ☒ NO

GARY HORNE

NAME OF APPELLANT

HON. TRACY NICKSON 334-285-1776
(Appellant's Attorney) (Telephone No.)

2181 AA COBBS ROAD
(Address)

PRATTVILLE, AL. 36066
(City) (State) (Zip Code)

V.

STATE OF ALABAMA

NAME OF APPELLEE

(State represented by Attorney General)

NOTE: If municipal appeal, indicate above, and enter
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(For Court of Criminal Appeals Use Only)

EXHIBIT

tabbies

A

INDEX: SUPPLEMENTAL

COPY OF ENVELOPE FRONT ----- 01

CERTIFICATE OF COMPLETION &
TRANSMITTAL OF RECORD
ON APPEAL BY TRIAL CLERK ----- 02 - 03

COURT REPORTER'S COVER SHEET ----- 01

COURT REPORTER'S PROCEEDINGS ----- 02 - 05



OFFICE OF DISTRICT ATTORNEY

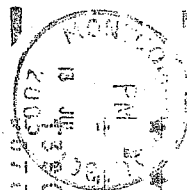
3RD JUDICIAL CIRCUIT

KIRKE ADAMS, DISTRICT ATTORNEY

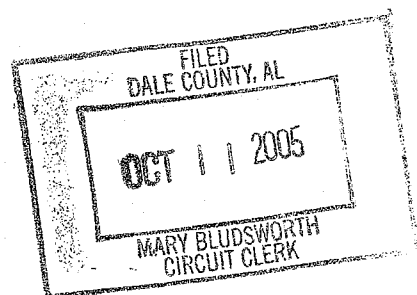
POST OFFICE BOX 1688

OZARK, ALABAMA 36361

Honorable N. Tracy Nickson
2181 AA Cobbs Ford Rd.
Prattville, AL 36066



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1338 US POSTAGE P8354408
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36066-7704

AP 14-3 Certificate of Completion and Transmittal of Record on Appeal by Trial Clerk

**CERTIFICATE OF COMPLETION AND TRANSMITTAL
OF RECORD ON APPEAL BY TRIAL CLERK**GARY HORNE

Appellant

TO: The Clerk of the Court of Criminal
Appeals of Alabama

V.

Case No. CC-2004-122

State of Alabama Appellee

Date of Notice of Appeal 9-8-2005

I certify that I have this date completed and transmitted herewith to the appellate court the record on appeal by assembling in (a single volume of 9 pages) (_____ volumes of 200 pages each and one volume of _____ pages) the clerk's record and the reporter's transcript and that one copy each of the record on appeal has been served on the defendant and the Attorney General of the State of Alabama for the preparation of briefs.

I certify that a copy of this certificate has this date been served on counsel for each party to the appeal.

DATED this 18th day of October, 2005.

Mary Blodsworth
Circuit Clerk

DALE _____

County _____

Civil Action No. _____

STATE OF ALABAMA

DALE _____

County _____

CIRCUIT COURT**CERTIFICATE OF COMPLETION
AND TRANSMITTAL OF RECORD
ON APPEAL BY TRIAL CLERK**

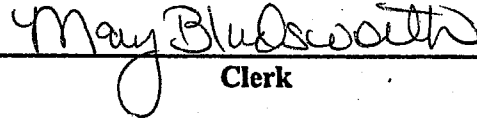
GARY HORNE

APPELLANT**V.****STATE OF ALABAMA****APPELLEE****FILED** _____

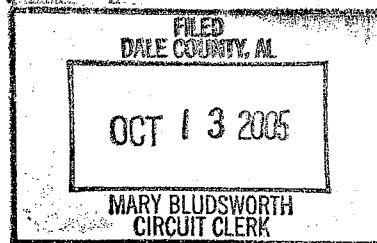
18th

October _____

, 20 05 .

**Clerk**

(The following is a supplement to the Record On Appeal in the State vs.
(Gary Horne case that was heard on the 16th day of May, 2005, in response
(to Defendant's Amended Second Motion To Supplement dated October 12, 2005
(7th, 2005.



1. At TR-112 the date for the sentencing hearing should be July 13th, 2005, and not July 14th, 2005.
2. (Clerk's Record) All exhibits that were marked and introduced at trial were submitted by the Reporter to the Clerk after Notice Of Appeal was filed. Reporter has no further exhibits in his possession.
3. The colloquy between the Court and the Jury, related to all Jury questions, is transcribed and attached to this supplement.
4. (Same as No. 3)

JURY QUESTIONS

(The following took place in the courtroom with
(the Defendant and his attorney present:

(FIRST QUESTION IN JURY ROOM)

THE COURT: Ladies and Gentlemen of the Jury, the Bailiff gave me the following question: "Was a bullet dropped at the scene, and if so, was the bullet in the State's possession?" I cannot answer that question. We can't reopen the case for more testimony. You'll have to base your verdict on what you heard in the trial of the case. Thank you.

(SECOND JURY QUESTION IN COURTROOM)

THE COURT: Ladies and Gentlemen of the Jury, the Bailiff gave me the following questions: "Concerning the assault in the 2nd degree charge, do we have to answer whether or not he acted in self-defense?"

The State has the burden of proving beyond a reasonable doubt that the Defendant did not act in self-defense and, if you find that the State met its burden and the Defendant did not act in self-defense, then you would just find him guilty of assault in the second degree, if that's what you're looking at.

Then if the State has not met its burden in proving that the Defendant did not act in self-defense, in other words, if you found that he was acting in self-defense, then you would find him not guilty. You don't have a separate verdict if you find that the Defendant was acting in self-defense.

If you find that he was acting in self-defense, then he would be not guilty of either of the charges. If you are not reasonably satisfied that he was acting in self-defense, but that he was guilty of assault in the second degree, then you would just sign the assault in the second degree verdict.

If you are satisfied he was acting in self-defense, then you find him not guilty. If you are not so satisfied, then you would find him guilty. That's what you're looking at as far as assault in the second degree is concerned. You don't have to answer whether or not he acted in self-defense as far as writing it down on a piece of paper, but you do have to answer that in deciding whether he's guilty or not. Does that make it clear?

JURORS: (Indicating the affirmative)

THE COURT: Thank you.

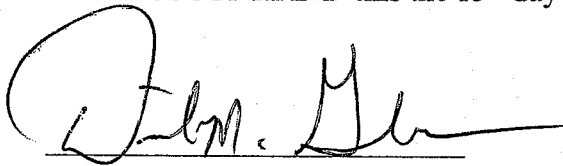
REPORTER'S CERTIFICATE

STATE OF ALABAMA

COUNTY OF DALE

I, David M. Glenn, CSR, do hereby certify that the foregoing typewritten pages are true and correct and were transcribed by me from my machine shorthand notes taken on said occasion.

WITNESS MY HAND this the 13th day of October, 2005.

A handwritten signature in black ink, appearing to read "D. M. Glenn", is written over a horizontal line.

David M. Glenn, CSR

COURT OF CRIMINAL APPEALS NO. CR 04-2461

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF DALE COUNTY, ALABAMA

CIRCUIT COURT NO. CC-2004-122

CIRCUIT JUDGE P.B. McLAUCHLIN, JR.

Type of Conviction / Order Appealed From: ASSAULT II

Sentence Imposed: 22 YEARS

Defendant Indigent: ☐ YES ☒ NO

GARY HORNE

HON. TRACY NICKSON

334-285-1776

NAME OF APPELLANT

(Appellant's Attorney)

2181 AA COBBS FORD ROAD

(Telephone No.)

(Address)

PRATTVILLE,

AL.

36066

(City)

(State)

(Zip Code)

V.

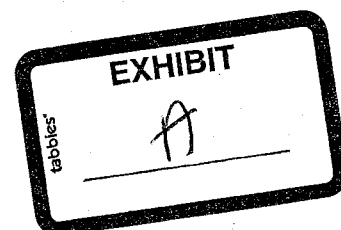
STATE OF ALABAMA

(State represented by Attorney General)

NAME OF APPELLEE

NOTE: If municipal appeal, indicate above, and enter
name and address of municipal attorney below.

(For Court of Criminal Appeals Use Only)



INDEX: SECOND SUPPLEMENTAL

COURT REPORTER'S COVER SHEET-----	01
COURT REPORTER'S PROCEEDINGS -----	02- 16
COURT REPORTER'S CERTIFICATE -----	17
CERTIFICATE OF COMPLETION & TRANSMITTAL OF RECORD ON APPEAL BY TRIAL CLERK -----	18- 19

STATE F ALABAMA	)	IN THE CIRCUIT COURT OF
PLAINTIFF	)	DALE CO., ALABAMA
)	
VS.)	
)	
GARY HORNE	)	CASE NO. CC-04-122
DEFENDANT)	

---o0o---

The following motion hearing was heard on the 16th day of December, 2004,
before the Honorable Judge P.B. McLauchlin, Jr. in the Dale County Courthouse,
Ozark, Alabama.

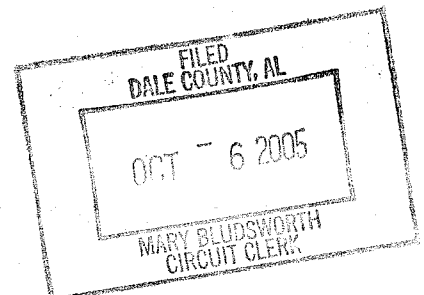
APPEARANCES:

FOR THE STATE

David Emery
District Attorney
Ozark, Alabama

FOR THE DEFENDANT

Tracy Nickson
Attorney At Law
Prattville, Alabama



PROCEEDINGS:

THE COURT: I call the case of the State Of Alabama vs. Gary Horne.

MR. NICKSON: This is on a motion to dismiss based on a Brady violation. Your Honor, on the second of September I filed a motion to dismiss, basically stating that Mr. Horne had been charged with attempted murder. We made a request for discovery and I was shown the evidence in this case and I was told that there was a projectile, a bullet, and subsequently learned of the location of the firearm believed to be the weapon used in this incident. The bullet disappeared and I have received no photographs of the scene.

THE COURT: Mr. Emery?

MR. EMERY: You saw a bullet?

MR. NICKSON: No, I didn't see a bullet, I was told there was a bullet.

MR. EMERY: We're here on a motion to dismiss?

THE COURT: Motion to dismiss and kind of a discovery motion or something. There can't really be a Brady violation until after you've tried the case and prove that they withheld evidence that might have aided in the defense.

MR. NICKSON: Your Honor, in Jefferson vs. State, 645 So. 2nd, states that the existence of any small piece of evidence favoring the defense may create just the doubt that prevents the Jury from returning a verdict of guilty.

I'm not saying there's any bad faith, but I haven't gotten photographs that were of the scene at all. There was three pieces of evidence that I saw. I have learned of this projectile and I have requested it and confirmed that it was in existence, but nobody has given it to me, nobody has let me see it. I've been told it's been lost. I have asked Mr. Rex Tipton to be here and want to ask him some questions.

My contention, Your Honor, is that the projectile is instrumental because we have a weapon that was purchased from the victim and we believe that to be the firearm used in this incident.

REX TIPTON

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. NICKSON:

Q State your name?

A Rex Tipton.

Q How are you employed?

A I am a pilot with Airspeed Aviation.

Q And where were you previously employed?

A Ozark Police Department.

Q Are you familiar with the case of the State Of Alabama vs. Gary Horne?

A Yes, sir, I am.

Q And were you the case agent in this case?

A Yes, I was.

Q In your investigation of this matter, did you discover any evidence at the scene?

A Yes and no. I have to back up a little bit and you need to get the whole – the night the shooting happened, I was the investigator on call.

Q Correct.

A Prior to me being notified, Lt. Keith Cauthen was on his way to work, driving by when it happened and he was the first one on the scene. Agent Martin Spears, who was an agent that was out that night, was the second one on the scene and he actually processed the scene that night. When I got to the scene, the victim was gone, the suspect was gone, most of the people had disbursed and I just came up as an afterthought.

Q Okay. Did you write a report on this?

A I done some case notes, Lt. Cauthen done the initial report.

Q Okay. In those case notes did you state in there that there were photographs taken at the scene?

A No, sir, because I didn't know.

Q You did not?

A I don't think so.

Q Is this your report?

A Yes, sir, that's mine.

Q Could you read that?

A Okay, it says the scene was photographed and evidence was collected by Spears, that would be Agent Spears.

Q And on the next page it indicates that the evidence collected has been retained by Agent Martin Spears?

A Yes.

Q Is that correct?

A Yes.

Q Do you know what evidence was collected by Agent Spears?

A No, sir, I do not.

Q Did you subsequently retrieve any evidence from the scene?

A Yes, sir, it was a day or two after and somebody called from the apartment complex and said they had found a projectile. I went over there and recovered the projectile and, from memory, I thought at the time – I have to back up a little bit.

At one point, the Drug Task Force, when they got evidence we kept it in our office. We were under a transition period with the new City Hall where all the evidence was turned over to Agent Spears and I assumed that projectile was turned over to Agent Spears. But since I left the department, I don't know what's happened to none of it, so, I can't testify to where that projectile is at.

Q Did you believe that projectile to be the projectile that passed through the victim?

A It's hard to say. I mean it was laying out in the open, but it was in the vicinity where Mr. Williams was shot.

Q Do you know if there was a projectile recovered from the victim's body?

A No, sir, I don't have a clue.

Q Do you know where that projectile might be at this time?

A No, sir, I don't.

Q Do you have any way of knowing what caliber projectile that was?

A I'm not an expert, but from my personal opinion in dealing with firearms, it looked like a .40 caliber.

Q So, you placed it in the hands of the Task Force and, in the transition, you haven't seen it since?

A Between the time that I left the Task Force and us moving evidence from one place to the next, I don't know what happened to it.

Q Is it your opinion that would have been the projectile from the weapon?

A I couldn't tell you what weapon it came from. The only thing I can tell you is where I found it at.

MR. NICKSON: That's all.

EXAMINATION

BY MR. EMERY:

Q And where was it found at?

A In the apartment complex over where the shooting happened.

Q Out in the open?

A It was out in a parking lot.

Q Somebody called it in?

A Yes, sir.

Q And this was how long after the shooting?

A It was either a day or two days after the shooting. I know it was over in the late afternoon.

Q And this happened in January?

A Yes, sir.

Q When did you stop working for the City?

A I think my last day was July the second of this year.

Q In the normal course of business at that time in January, the projectile would have been kept where?

A Usually we kept our evidence at the Task Force, but during that –

Q Over here on East Avenue?

A Yes, sir.

Q Okay.

A During that time we had just moved into the new city complex and they had a new evidence room over there and we had started transferring our evidence over to Agent Spears and it went into one place, evidence, dope, everything we had all went to Agent Spears. We did that for a couple of months and then it got so overwhelming for Agent Spears that he couldn't keep track, so, we started keeping our own evidence back at the Task Force.

Q The Task Force is still in the same place?

A Yes, sir.

Q Was anything else with this projectile?

A Like I said, I got there after the scene had already been worked by Agent Spears and –

Q But I mean in the case file or –

A No, I never had anything as far as evidence on this case except that one projectile that was recovered a day or two later.

Q Was it packaged up and identified?

A Yes, sir.

Q So, it should be either at the police department or at the Task Force?

A I would presume so.

Q You haven't had occasion to look for it?

A No, sir, I am not employed there any more.

MR. EMERY: That's all I have to ask.

EXAMINATION

BY MR. NICKSON:

Q Several months ago, Mr. Tipton, do you recall speaking to Mr. Ford?

A Yes.

Q Would you tell the Court what the subject matter of that conversation was?

A He was looking for the bullet.

Q Did Mr. Ford indicate that he had it?

A No, sir, he said he couldn't find it.

MR. NICKSON: That's all.

JOHN WILLIAM DASSINGER

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. NICKSON:

Q State your name?

A John Dassinger.

Q Where are you employed?

A Right now I'm doing side jobs with Terminex.

Q Do you know the Defendant Mr. Horne?

A Kind of.

Q Are you familiar with what he is charged with?

A Yes, sir.

Q Do you personally know the victim?

A Yes, sir.

Q Mr. Williams?

A Yes, sir.

Q Did you have an occasion to speak with Mr. Williams or procure anything from Mr. Williams after January the 15th of this year?

A I bought a pistol from him in late January.

Q What kind of pistol was it?

A A Glock .40 caliber.

Q Do you know where that gun is now?

A The police got it.

Q How did the police come to get it?

A They pulled me over and asked me if I had anything in my car and I told them that it was between the seats.

Q And where did you acquire that firearm?

A From John Williams.

Q And it was after the 15th of January?

A Yeah, it was late January.

Q Did Mr. Williams tell you anything about the firearm?

A No, I had tried to get it like numerous times before and he would never get rid of it. Then I had seen him right after he got out of the hospital and he asked me, "Do you still want to get that gun?", and I was like, "Yeah, you know, but I ain't really like got a whole lot of money", and he told me I could get it for a hundred bucks and I had that much, so, I bought it.

Q And you had tried to buy it numerous times before?

A Yes.

MR. NICKSON: That's all.

EXAMINATION

BY MR. EMERY:

Q When did the police take the gun from you?

A I'm not really sure, I don't remember what day it was when I got pulled over.

Q Do you know what month it was?

A February or March.

Q Were you arrested?

A Yes, sir.

Q What were you arrested for?

A Carrying a firearm without a permit, possession of marijuana and possession of a controlled substance.

Q Was anybody with you?

A Yeah, two friends of mine.

Q Who were they?

A Matt Thomas and Bo Shinholster.

Q So, the police took the gun from you?

A Yes, sir.

Q The Ozark Police?

A Yes, sir.

Q Were you charged with possession of a stolen pistol?

A That's what they tried to say, but when the officer called in the serial numbers, he called it in as a Glock-19 and the lady on the radio came back and told him – she corrected him that it was a Glock-40 and there was negative 29's on it.

Q Okay.

A They tried to say I had altered the serial numbers at first, but the guns have plastic and you can't really touch the serial numbers without messing up the gun.

Q Were the serial numbers messed up some way?

A They were on both sides of it, and on the clip, and they all matched.

Q It didn't come back to a probation officer in Georgia?

A I don't know. They said it belonged to some lady in Georgia, but they didn't say nothing about who or what she did.

MR. EMERY: That's all I have to ask.

MARTIN SPEARS

Having been first duly sworn, was examined and testified as follows, to-wit:

EXAMINATION

BY MR. NICKSON:

Q State your name?

A Martin Spears.

Q Where are you employed?

A City Of Ozark Police Department.

Q Are you currently employed there?

A Yes, sir.

Q Were you employed there on January the 16th of this year?

A Yes, sir.

Q And did you collect certain evidence involved in this case?

A Yes, sir, I did.

Q And could you tell us what specifically was collected?

A I collected a shell casing, a spent shell casing from a .40 caliber gun, cellophane wrapper that appeared to have some residue of narcotics in it and a pager.

Q Did you take photographs at the scene?

A Yes, sir, I did.

Q And do you have those photographs?

A No, sir, I do not.

Q Those are the only three pieces of evidence that you and I looked at?

A Correct.

Q And there was not a projectile in there?

A No, sir.

Q Do you recall receiving the projectile?

A No, sir, but I received a mass amount of evidence at one time from Narcotics when we moved their evidence room and it is possible that projectile is in that large sum of evidence. All of it has not been processed yet into the new room.

Q So, you didn't even get to see the projectile?

A No, sir.

MR. NICKSON: That's all.

EXAMINATION

BY MR. EMERY:

Q When did you take the photographs?

A The night of the incident.

Q And what were they pictures of?

A They were of the crime scene and the evidence as I collected it.

Q The only thing that you mentioned that was collected is the shell casing?

A Shell casing and cellophane wrapper and pager.

Q What about the cellophane wrapper?

A It just appeared to have some narcotics residue in it.

Q Where was it found?

A In the parking lot adjacent to a curb, right in front of the scene.

Q This is in an apartment complex?

A Yes, sir.

Q Where was the pager?

A It was between two vehicles located in the parking lot and in front of the scene where Mr. Williams was laying.

Q It was on the ground?

A Yes, sir.

Q Was it near Mr. Williams?

A Approximately ten yards.

Q Whose pager was it?

A From what the witnesses stated at the scene, it belonged to Mr. Horne.

Q Has it been checked by the numbers or anything?

A No, sir.

Q Were there witnesses to this crime?

A Yes, sir.

Q People that actually saw the shooting?

A I can't advise you of that, sir, I didn't question any of the witnesses. All I did was collect the evidence and the photographs.

Q Were the photographs developed?

A Ozark Police Department policy is that a Supervisor has to turn in all photography and they are the only ones that can pick it up. I packaged the roll of film to be developed and it was turned over to a Supervisor to be carried to the film developing location and the package that it was in was marked to be carried to Narcotics after development. Where it went after turned over to the Supervisor, I can't advise you.

Q Who was the Supervisor at that time?

A I believe it was Butch Whittington at that time.

Q But you haven't seen the developed pictures?

A No, sir, I have not.

MR. EMERY: That's all I have to ask.

EXAMINATION

BY MR. NICKSON:

Q Are you familiar with the victim?

A Not on a personal basis. On a professional basis, I think I have dealt with him I think on one more case.

Q Has he ever been known to carry a firearm?

A I can't advise one way or the other.

MR. NICKSON: Thank you. Your Honor, that's the basis of our motion, evidence that would tend to prove the Defendant's self-defense. Testimony at the preliminary hearing was that Mr. Williams owned guns but he did not have a gun. The testimony that this gun was sold by Mr. Williams subsequent to this is crucial to the defense in this case. It's our contention that it was the victim's firearm and the Defendant was merely defending himself.

MR. EMERY: Your Honor, it would appear to me that the Defendant's position is premature. I mean this case is not ready to be tried.

MR. NICKSON: This case has been set since September the 14th for trial and I believe this is the 4th time I have been here and --

MR. EMERY: It's not set today.

THE COURT: Let me look at this and I'll have a ruling on it shortly.

MR. NICKSON: Thank you, Your Honor.

END OF HEARING

REPORTER'S CERTIFICATE

STATE OF ALABAMA

COUNTY OF DALE

I, David M. Glenn, CSR, do hereby certify that the foregoing typewritten pages are true and correct and that the same were transcribed by me from my machine shorthand notes taken on said occasion.

 10-6-05

David M. Glenn, CSR

AP 14-3 Certificate of Completion and Transmittal of Record on Appeal by Trial Clerk

**CERTIFICATE OF COMPLETION AND TRANSMITTAL
OF RECORD ON APPEAL BY TRIAL CLERK**

GARY HORNE

Appellant

TO: The Clerk of the Court of Criminal
Appeals of Alabama

V.

Case No. CC-2004-122

State of Alabama Appellee

Date of Notice of Appeal 9-8-2005

I certify that I have this date completed and transmitted herewith to the appellate court the record on appeal by assembling in (a single volume of 19 pages) (volumes of 200 pages each and one volume of pages) the clerk's record and the reporter's transcript and that one copy each of the record on appeal has been served on the defendant and the Attorney General of the State of Alabama for the preparation of briefs.

I certify that a copy of this certificate has this date been served on counsel for each party to the appeal.

DATED this 7th day of October, 2005.

May Rudsworth
Circuit Clerk

DALE

County

Civil Action No. _____

STATE OF ALABAMA

DALE _____ County

CIRCUIT COURT

**CERTIFICATE OF COMPLETION
AND TRANSMITTAL OF RECORD
ON APPEAL BY TRIAL CLERK**

GARY HORNE

APPELLANT

V.

STATE OF ALABAMA

APPELLEE

FILED _____ 7th

OCTOBER _____, 20 05 .

Mary Bludsworth
Clerk

COURT OF CRIMINAL APPEALS No. CR 04-2461

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF DALE COUNTY, ALABAMA

CIRCUIT COURT NO. CC-2004-122

CIRCUIT JUDGE P.B. McLAUCHLIN, JR.

Type of Conviction / Order Appealed From: ASSAULT II

Sentence Imposed: 22 YEARS

Defendant Indigent: ☒ YES ☐ NO

GARY HORNE

HON. TRACY NICKSON 334-285-1776
(Appellant's Attorney)
 2181 AA COBBS FORD ROAD (Telephone No.)
(Address)
 PRATTVILLE AL. 36066
(City) (State) (Zip Code)

NAME OF APPELLANT

V.

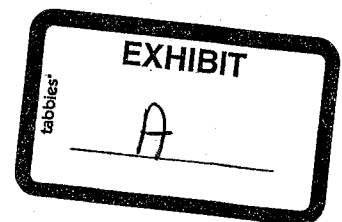
STATE OF ALABAMA

(State represented by Attorney General)

NAME OF APPELLEE

NOTE: If municipal appeal, indicate above, and enter name and address of municipal attorney below.

(For Court of Criminal Appeals Use Only)



INDEX SUPPLEMENTAL:

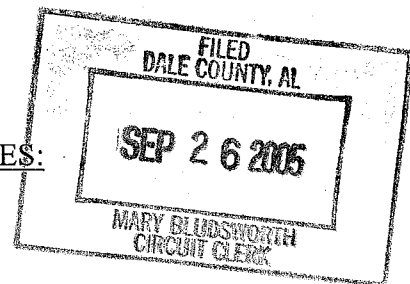
COURT REPORTER'S COVER SHEET -----	01
COURT REPORTER'S JURY QUESTION-----	02 - 03
COURT REPORTER'S CERTIFICATE -----	04
CERTIFICATE OF COMPLETION & TRANSMITTAL OF RECORD ON APPEAL BY TRIAL CLERK -----	05 - 06

STATE OF ALABAMA	)	CIRCUIT COURT OF
PLAINTIFF	)	DALE CO., ALABAMA
)	
VS.)	
)	
GARY HORNE	)	CASE NO. CC-04-122
DEFENDANT)	

COURT REPORTER'S SUPPLEMENT TO
RECORD ON APPEAL

The following is a supplement to the Record On Appeal and was submitted as ordered by the Court pursuant to the Defendant's motion to supplement.

APPEARANCES:



FOR THE STATE

FOR THE DEFENDANT

Bill Filmore
Asst. District Attorney
Ozark, Alabama

Tracy Nickson
Attorney At Law
Dothan, Alabama

JURY QUESTION

THE COURT: Ladies and Gentlemen of the Jury, the Bailiff gave me the following question: "Concerning the Assault in the 2nd degree charge, do we have to answer whether or not he acted in self defense?"

The State has the burden of proving beyond a reasonable doubt that the Defendant did not act in self defense. If you find the State met its burden and the Defendant did not act in self defense, then you would just find him guilty of Assault in the 2nd degree and sign that verdict, if that's what you're looking at.

Then if the State has not met its burden in proving that the Defendant did not act in self defense; in other words, if you found that he was acting in self defense, then you would find him not guilty. But, you don't have a separate verdict if you find the Defendant was acting in self defense. If you find that he was acting in self defense, then he would be not guilty of any of the charges. If you find that the State hadn't met its burden, he would be not guilty of the charges. But, if you are not reasonable satisfied that he was acting in self defense, and that he was guilty of Assault in the 2nd degree, then you would just sign the Assault in the 2nd degree verdict.

If you are satisfied he was acting in self defense, then you find him not guilty.

If you are not so satisfied, then you would find him guilty. That's what you're looking at as far as Assault in the 2nd degree is concerned. But, you do not

have to have – you don't have to answer whether or not he acted in self defense as far as writing it down on a piece of paper, but you do have to answer that in deciding whether he's guilty or not guilty. Does that make it clear?

JUROR: Yes, sir.

THE COURT: Okay, you may continue your deliberations. Thank you.

END OF JURY QUESTION

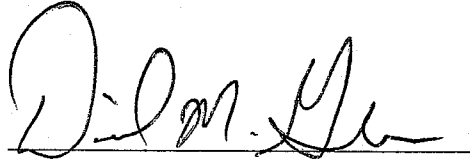
REPORTER'S CERTIFICATE

STATE OF ALABAMA

COUNTY OF DALE

I, David M. Glenn, CSR, do hereby certify that the foregoing typewritten pages are true and correct and that the same were transcribed by me from my machine shorthand notes taken on said occasion.

WITNESS MY HAND this the 26th day of September, 2005.

A handwritten signature in cursive script, appearing to read "D. M. Glenn", is written over a horizontal line.

David M. Glenn, CSR

AP 14-3 Certificate of Completion and Transmittal of Record on Appeal by Trial Clerk

**CERTIFICATE OF COMPLETION AND TRANSMITTAL
OF RECORD ON APPEAL BY TRIAL CLERK**

GARY HORNE

Appellant

TO: The Clerk of the Court of Criminal
Appeals of Alabama

V.

Case No. CC-2004-122

State of Alabama Appellee

Date of Notice of Appeal 9-8-2005

I certify that I have this date completed and transmitted herewith to the appellate court the record on appeal by assembling in (a single volume of 6 pages) (volumes of 200 pages each and one volume of pages) the clerk's record and the reporter's transcript and that one copy each of the record on appeal has been served on the defendant and the Attorney General of the State of Alabama for the preparation of briefs.

I certify that a copy of this certificate has this date been served on counsel for each party to the appeal.

DATED this 30th day of SEPTEMBER, 2005.

Mary Bludworth
Circuit Clerk

DALE

County

Civil Action No. _____

STATE OF ALABAMA

DALE _____ County

CIRCUIT COURT**CERTIFICATE OF COMPLETION
AND TRANSMITTAL OF RECORD
ON APPEAL BY TRIAL CLERK**

GARY HORNE

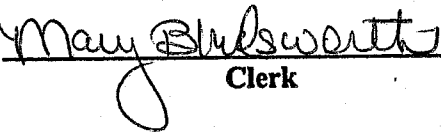
APPELLANT**V.****STATE OF ALABAMA****APPELLEE****FILED** _____ 30thSEPTEMBER _____, 20⁰⁵.
Clerk

Exhibit B

DOCKET NUMBER:

IN THE ALABAMA COURT OF CRIMINAL APPEALS

GARY HORNE,
APPELLANT,

v.

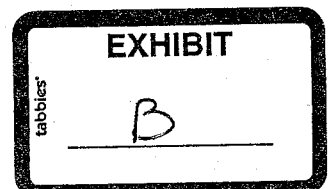
STATE OF ALABAMA,
APPELLEE.

From the Circuit Court of Dale County, Alabama
Case No. CC-2004-1220

BRIEF OF THE APPELLANT

N. TRACY NICKSON
COUNSEL FOR APPELLANT
2181 AA COBBS FORD ROAD
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(334) 285-1776

ORAL ARGUMENT REQUESTED



STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. Appellant believes that oral argument would assist this Court in arriving at a conclusion in this action.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT.....	i
TABLE OF CONTENTS	ii
STATEMENT OF JURISDICTION	iii
STATEMENT OF THE CASE	1
STATEMENT OF THE ISSUES	3
STATEMENT OF THE FACTS	4
SUMMARY OF THE ARGUMENT.....	7
STATEMENT OF THE STANDARD OF REVIEW.....	8
ARGUMENT	10
CONCLUSION	44
CERTIFICATE OF SERVICE	46
APPENDIX I Actions Adverse to Appellant.....	47
APPENDIX II Excerpt from Petition for Writ of Mandamus.....	48

STATEMENT OF JURISDICTION

This Honorable Court exercises jurisdiction over this matter pursuant to Rule 3, Alabama Rules of Appellate Procedure, and § 12-22-240, Code of Alabama 1975.

TABLE OF AUTHORITIESALABAMA CASES

<u>Arrington v. State</u> , 869 So. 2d 532 (Ala.Crim. App.2003).....	18
<u>Burgin v. State</u> , 824 So. 2d 77 (Ala.Crim.App., 2001).....	27
<u>Connolly v. State</u> , 602 So. 2d 452 (Ala.1992).....	39
<u>Cooper v. State</u> , 632 So. 2d 1342 (Ala. Crim. App. 1993).....	37
<u>Ex parte Brown</u> , 548 So.2d 993 (Ala.1989).....	14
<u>Ex parte Cammon</u> , 578 So.2d 1089 Ala(1991).....	14
<u>Ex Parte Crews</u> , 797 So. 2d 1119 (Ala. 2000).....	38
<u>Ex parte Gingo</u> , 605 So.2d 1237 (Ala.1992)	17
<u>Grissom v. State</u> , 624 So. 2d 706 (Ala. Crim. App 1993).....	22
<u>Gratton v. State</u> , 455 So. 2d 189 (Ala. Crim. App. 1984).....	38
<u>Holsclaw v. State</u> , 406 So.2d 1019 (Ala.Crim.App.1981).....	39

Jefferson v. State, 645 So. 2d 313

(Ala. Crim. App. 1994)..... 10

Nesbitt v. State, 531 So. 2d 37

(Ala.Cr.App.1987)..... 37

Petite v. State, 520 So. 2d 207

(Ala.Crim.App.1987)..... 27

Wilson v. State, 874 So. 2d 1145 (Ala. 2003)..... 8

FEDERAL CASES

Application of Kapatos, 208 F.Supp. 883, 888

(SDNY 1962) 18

Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct.

333, 102 L.Ed.2d 281 (1988) 17

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194,

10 L.Ed.2d 215 (1963)..... 8

Chapman v. California, 386 U.S. 18, 87 S.Ct.

824, 17 L.Ed.2d 705 (1967) 24

Giglio v. United States, 405 U.S. 150, 154

[92 S.Ct. 763, 766, 31 L.Ed.2d 104] (1972)..... 16

Giles v. Maryland, 386 U.S. 66, 98 [87 S.Ct. 793,

809, 17 L.Ed.2d 737] (1967)..... 18

<u>Napue v. Illinois</u> , 360 U.S. 264, 269 [79 S. Ct. 1173, 1177, 3 L.Ed.2d 1217] (1959).....	16
<u>Strickler v. Greene</u> , 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).....	10
<u>United States v. Bagley</u> , 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).....	20

STATUTORY AUTHORITY

Rule 26.6(b)(3), Alabama Rules of Criminal Procedure.....	26
Rule 401, Alabama Rules of Evidence.....	33
Rule 45, Alabama Rules of Appellate Procedure	24
Title 13A-5-10.1, Code of Alabama 1975.....	28

TREATISES

W. LaFave and J. Israel, 2 Criminal Procedure §19.5 (1984)	22
--	----

STATEMENT OF THE CASE

Appellant Gary Horne was arrested on 16 January 2004 for the attempted murder, with a handgun, of John Williams in Dale County, Alabama. Appellant, represented by counsel, filed a request for discovery on 29 March 2004. CR-016. Appellant filed a Motion to compel production of discovery on 14 May 2004. CR-046. On 3 September 2004, Appellant filed a Motion to Dismiss essentially based on the failure of the State to provide evidence which it collected at the scene of the crime. CR-095. A hearing on this Motion was conducted on 16 December 2004. (Second Supplemental Transcript-01). Following the hearing, but on the same day, the Trial Court denied Appellant's Motion to Dismiss without opinion. Appellant sought relief from this denial by filing a Petition for the issuance of a Writ of Mandamus with this Honorable Court, which petition was denied by this Honorable Court on 4 February 2005, Alabama Criminals Appeal Number CR-04-0545. A document contained as Exhibit 5 within that petition is appended hereto as Appendix II; it along with many

other items, as suggested by the numerous supplements, was not included in the instant record on appeal despite having been stamped received by the Dale County Circuit Clerk.

Trial was conducted on 18 May 2005, after which the jury found the Appellant guilty of Assault in the 2d degree. CR-002. Sentencing was scheduled for 13 July 2005. CR-002. Appellant filed numerous post-trial motions (which will be explored more fully within the succeeding pages, including a Motion to Vacate Sentence (CR-077) and Motions for New Trial. CR-051, CR-077. On 13 July 2005 Appellant was sentenced, over objection, under the Habitual Felony Offender Act to twenty-two years in the state penitentiary. Appellant filed a Motion to Clarify which, like all other post-trial motions, was denied. Appellant now appeals both his conviction and his sentence.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE I

WHETHER THE CONVICTION OF THE APPELLANT MAY
STAND WHERE THE STATE FAILED TO PRODUCE POTENTIALLY
EXCULPATORY EVIDENCE GATHERED BY THE STATE?

ISSUE II

WHETHER THE DEFENDANT WAS ILLEGALLY SENTENCED
THROUGH INVOCATION OF THE HABITUAL FELONY OFFENDER
ACT?

STATEMENT OF THE FACTS

The Appellant Gary Horne was charged with the attempted murder of John Williams, both residents of Dale County, Alabama at the time, where said crime was alleged to have taken place at night in front of an apartment complex. TR-48. Law enforcement officers collected evidence at the scene, which evidence later was unable to be located (Second Supplemental Transcript-6, 13); numerous motions were made at both District and Circuit court levels for an order compelling production of this evidence, all of which were granted. (CR-028, 031, 038). This evidence consisted of a bullet and photographs taken by officers or evidence technicians. Appellant made very specific discovery requests, which were ordered. CR-040. Following the failure of the State to provide this evidence, Appellant moved the Trial Court to dismiss the charges citing pertinent Alabama and federal case law. (CR-095). Following the Trial Court's denial of this motion, Appellant sought from this Honorable Court a writ of mandamus to issue

directing the Trial Court to dismiss the action, which petition was denied by this Honorable Court on 4 February 2005, Alabama Criminals Appeal Number CR-04-0545. A document contained within this Petition is appended hereto.

Trial of the action began on 16 May 2005, and was concluded on 18 May with the jury finding Appellant guilty of Assault Second Degree. CR-002.

A sentencing hearing was conducted on 13 July 2005. At this hearing the State sought to introduce evidence of Appellant's prior convictions for the purposes of enhancing his sentence under pursuant to the Habitual Felony Offender Act (HFOA). TR-113. Appellant objected on the ground, inter alia, that he had been afforded no prior notice whatsoever of the State's intent to seek enhancement. TR-113, 114. The State argued that the notice had been filed on 11 July 2005, although the record demonstrates that this was flatly not the case. CR-081; Supplemental 3rd Transcript-2, which will be discussed fully below. Appellant implored the Trial Court, if it found notice as required by the statute to have been given,

to specify what form the notice took and what time it was provided both and at sentencing hearing (TR-142) and in his Post-Trial Motion to Clarify Post-Trial Ruling. CR-091. The Trial Court overruled these objections and sentenced the Appellant to twenty-two years, refusing to specify what particular notice of the State's intent was provided to the Appellant. Appellant filed motions for new trial (CR-051,074), to clarify what notice was given (CR-091), and to vacate sentence. CR-078. In his Motion to Vacate Sentence and at the hearing on the motion, the Appellant argued that postmarks appearing on the envelope in which the State's Notice of Habitual Offender Status was delivered clearly demonstrated the impossibility of the receipt thereof by Appellant prior to the sentencing hearing, and indeed Appellant received the notice of intent to enhance via mail at least two days after he had been sentenced. CR-078, TR-127. All of these motions were denied by order of the trial court issued on 19 August 2005. CR-084.

SUMMARY OF THE ARGUMENT

The Trial Court plainly and reversibly erred in failing to dismiss the action when testimony by law enforcement officers revealed that crucial items of evidence, which were likely exculpatory in character, were gathered by officers at the scene but subsequently and irretrievably lost by the State.

The Trial Court abused its discretion by sentencing the Appellant under the Habitual Felony Offender Act despite the record overwhelmingly showing that Appellant was afforded no prior notice whatsoever of the intent of the State to seek such enhancement.

STATEMENT OF THE STANDARD OF REVIEW

The standard of review regarding the evidentiary issue is for plain error in upholding a verdict of guilt where potentially exculpatory evidence was not provided to the Appellant, in contravention of the holdings in Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and other cases cited below. "There are three components of a true Brady violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, that evidence must have been suppressed by the state, either willfully or inadvertently, and prejudice must have ensued" Wilson v. State, 874 So. 2d 1145 (Ala. 2003). Standards which concern reasonable probability of a different result had the withheld evidence been provided are of no consequence here, in that such a determination is not feasible where the evidence had been irretrievably lost prior to trial. The standard of review is for plain error regarding the Brady claim.

The standard of review regarding the illegal sentence is for an abuse of the discretion afforded the trial court in Connolly v. State, 602 So.2d 452, 454 (Ala.1992), which held that the determination of the reasonableness of prior notice afforded a defendant of the intent of the state to proceed under the Habitual Felony Offender Act was left within the discretion of the trial court, a determination not to be disturbed absent a clear showing of an abuse of that discretion.

ARGUMENT

ISSUE I: WHETHER THE CONVICTION OF THE APPELLANT MAY STAND WHERE THE STATE FAILED TO PRODUCE POTENTIALLY EXCULPATORY EVIDENCE GATHERED BY THE STATE?

Under the settled laws of Alabama and of the United States of America, a conviction may not stand where the state failed to provide potentially exculpatory evidence. In this case the potentially exculpatory evidence which was lost consisted of, by the State's own admission, a bullet and photographs.

Under Alabama and federal law the failure of the state to provide potentially exculpatory items of evidence, whether willful or inadvertent, forecloses a verdict against the defendant in any case.

Jefferson v. State, 645 So. 2d 313 (Ala. Crim. App. 1994); Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), and other cases which will be presently cited. As no verdict of guilt could be legally reached in this action, the verdict against the Appellant cannot stand and his conviction is due to be reversed. This prior foreclosure of a verdict

against the Appellant in any event under situations in which material evidence is irretrievably lost grounded the petition for writ of mandamus which was filed in this before this Honorable Court on 30 December and denied without opinion on 4 February 2005, appended hereto.

Appellant was granted a hearing on his Motion to Dismiss (CR-095) on 16 December 2004. At this hearing, investigating law enforcement officers Rex Tipton and Martin Spears testified that "the scene was photographed and evidence was collected by [Agent Martin] Spears." Second Supplemental Transcript-1. The evidence which was collected consisted of a what appeared to the officer to be a .40 caliber bullet (Second Supplemental Transcript-5-6, 12), a spent .40 caliber shell casing (Second Supplemental Transcript-12), and photographs of the scene. (Second Supplemental Transcript-13). Tipton's testimony showed that the projectile was lost (Second Supplemental Transcript-6), although it had been packaged and identified. Second Supplemental Transcript-8. The testimony of Spears indicated that

the photographs taken by him at the scene were also lost. Second Supplemental Transcript-13.

Also testifying at this hearing was John William Dassinger, who said he purchased a "Glock-40" from the alleged victim in the case after the shooting (Second Supplemental Transcript-9, 10) and further that he had been trying to purchase it for some time when the alleged victim suddenly offered it to him for one hundred dollars (Second Supplemental Transcript-10), where Dassinger further testified that the gun was seized by Ozark police later in 2004. This history comported with Appellant's theory of self-defense advanced at trial, where it was sought to be proved that the victim in the case was actually the aggressor and was shot with his own gun after he drew it on Appellant.

Upon learning of the existence of the projectile and the gun to which the projectile could possibly be matched, Appellant on 27 April 2004 filed a "Motion to Preserve Evidence," i.e., the .40 caliber handgun, in both the courts presiding over the instant case and also in Dassinger's case. Appendix II, Exhibit 5.

Clearly if the projectile found at the scene matched the gun that Williams (the alleged victim) sold to Dassinger after the shooting, Appellant's claim of self-defense could have been proven with virtual conclusiveness. However three articles of evidence which were crucial to the Appellant's defense were apparently lost forever: the projectile, the handgun, and the crime-scene photographs. The failure by the State to provide these potentially, and in all likelihood probably, exculpatory items of evidence, whether willful or inadvertent, forecloses a verdict against the Defendant in any case. Jefferson v. State, 645 So. 2d 313 (Ala. Crim. App. 1994); Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), Thus, "[t]here are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued,"

cited by Alabama Supreme Court in Wilson v. State, 874 So. 2d 1145 (2003). Stickler further holds that prejudice ensues where "there is a reasonable probability that his conviction ... would have been different had these materials been disclosed." 527 U.S. at 296, 119 S.Ct. 1936. In this case the lost evidence may well have completely exonerated the Appellant if it were shown that he was shot with the same gun he sold days after the shooting.

"To prove a Brady violation, a defendant must show (1) that the prosecution suppressed evidence, (2) that the evidence was of a character favorable to his defense, and (3) that the evidence was material." Ex parte Cammon, 578 So.2d 1089, 1091 (Ala.1991); Ex parte Brown, 548 So.2d 993, 994 (Ala.1989).

Here the prosecution lost evidence, which effectively suppressed the evidence (as will be shown, the good or bad faith of the state in withholding the evidence is immaterial); the evidence could clearly have been favorable to the accused if it proved that the victim was shot with his own gun, which would conclusively refute the victim's

testimony; and the evidence was material. The state itself collected the evidence in its prosecution of the Appellant.

As no verdict of guilt could be legally reached in this action, the verdict against the Appellant cannot stand and his conviction is due to be reversed.

On the issue of impeachment evidence (as a type of exculpatory evidence), this Court has held in Jefferson v. State, 645 So. 2d 313 (Ala. Crim. App. 1994), that the loss or non-production by the State of such evidence to be a factor in ultimately reversing the conviction of the defendant. As with the other evidence at issue, the true extent of their impeachment and exculpatory value will never be fully known, as they have been irretrievably lost. A witness for the state testified that she saw Appellant commit the crime. TR-43. The lost photographs would have tended to directly refute testimony of this State's witnesses. Jefferson, supra, goes on to hold, "Impeachment evidence ... as well as exculpatory evidence, falls within the *Brady*

rule. See Giglio v. United States, 405 U.S. 150, 154 [92 S.Ct. 763, 766, 31 L.Ed.2d 104] (1972). Such evidence is 'evidence favorable to an accused,' *Brady*, 373 U.S. at 87 [83 S.Ct. at 1196], so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Napue v. Illinois, 360 U.S. 264, 269 [79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217] (1959) ('the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend')."

The materiality of the gun and the projectile as exculpatory, and perhaps also impeachment, evidence can never be adequately assessed; however, this should logically not work to the State's advantage or benefit as it was the State's presumed negligence that caused the evidence to be unavailable to the Appellant in the first place. While the loss of the potentially exculpatory evidence seems in this instance to be truly inadvertent, it was inarguably

negligent. Inadvertence does not excuse a violation of *Brady*; "[T]he good faith or bad faith of the prosecution' is immaterial." Jefferson v. State, 645 So. 2d 313 (Ala. Crim. App. 1994) citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "The good or bad faith of the state is immaterial when the lost evidence is so critical to the defense as to make a criminal trial fundamentally unfair." Youngblood, infra at 339. The State concedes that it had at one time each piece of evidence but had lost them. "There may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is so critical to the defense as to make a criminal trial fundamentally unfair." Ex parte Gingo, 605 So.2d 1237, 1241, (Ala. 1992), citing Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). The potential for abuse of a process in which "losing" exculpatory evidence warrants no sanction whatsoever clearly invites abuse of that process. Just as clearly, had the missing evidence in this case been available, the Appellant's claim of

self-defense could have been bolstered immeasurably, and in all likelihood bolstered to the point of acquittal. "The existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty."

Arrington v. State, 869 So.2d 532 (Ala. Crim. App. 2003), citing Jefferson, *supra*.

Also in Jefferson, *supra*, this Court adopted the dissent of Justice Marshall as stated in United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), which held: " '[T]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one.' Application of Kapatos, 208 F.Supp. 883, 888 (SDNY 1962); Giles v. Maryland, 386 U.S. 66, 98 [87 S.Ct. 793, 809, 17 L.Ed.2d 737] (1967) (Fortas, J., concurring in judgment) ('The State's obligation is not to convict, but to see that, so far as possible, truth emerges'). When evidence favorable to the defendant is known to exist, disclosure only enhances the quest for truth; it takes no direct toll on that inquiry. Moreover,

the existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference.

When the State does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and thereby undermines the reliability of the verdict." Jefferson at 316, 317.

In the instant case what is certain is that the jury flatly rejected the State's contention that Appellant attempted to murder anyone, by finding him guilty instead of Assault Second Degree; this makes the issue of irretrievably lost evidence of even greater potential significance.

In Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States

Supreme Court ruled that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

In Wilson, the Alabama Supreme Court reversed the Court of Criminal Appeals on the sole issue of prejudice, or more accurately the absence thereof, to the defendant stemming from failure by the State to provide evidence. The instant case is readily distinguishable in several aspects; in the instant case the Appellant was clearly prejudiced in presenting his defense of self-defense and in his effort to impeach State's witnesses. Further, the value of the evidence to the defendant in Wilson could be calculated; in the instant case that is

simply not possible. To the anticipated argument of the State that ballistics testing of the gun and the projectile may not have absolved the Appellant, he responds that it may well have; the loss of the evidence forever precludes any plausible assessment. Surely fairness dictates that the Appellant shouldn't be penalized for the state's loss of the evidence. The State clearly considered the spent projectile and the photographs important enough to collect and maintain in connection with its prosecution of the Appellant; likewise Appellant recognized the potentially exculpatory value of the evidence and made effort to preserve and obtain them. Appendix II, Exhibit 5, "Motion to Preserve Evidence." Again, Appellant avers that any uncertainty regarding the value of lost, potentially exculpatory evidence should be resolved in his, not the State's, favor, pursuant to considerations of due process. Any other result could inspire, in unscrupulous quarters, convenient "loss" by the state of evidence with impunity.

This Honorable Court in Grissom v. State, 624 So.2d 706 (Ala. Civ. App. 1993), cited an ineffably pertinent passage: "When the defendant claims that the government lost or destroyed exculpatory evidence, courts face two difficulties not presented in the typical nondisclosure case. Since the missing material cannot be produced for inspection, the court often cannot say with certainty that the material would or would not have been favorable to the accused. Second, the nondisclosure cannot be remedied by simply granting the defendant a new trial. Ordinarily, the only feasible remedies are dismissal of the prosecution or, if the missing evidence could have been used only to impeach a particular item of prosecution evidence, exclusion of that evidence.'" Grissom, supra, citing W. LaFave and J. Israel, 2 Criminal Procedure § 19.5 (1984). These are the precisely identical set of circumstances existing in the instant case, and both choices of remedies are applicable; the photographs are certainly impeachment evidence, but may have been more. The projectile and

gun are simply lost but may have conclusively established Appellant's innocence.

The trial court stated at the commencement of the hearing that, "there really can't be a Brady violation until after you've tried the case and prove that they withheld evidence that might have aided the defense." Second Supplemental Transcript-2. Aside from the more general question of the accuracy of this assessment of the strictures imposed by Brady, it is certainly not applicable to the present case here, where proof of the withholding or loss was adduced prior to trial by the admission of the same law enforcement officers who had possessed and then lost the evidence. There was no need to prove at trial what the state freely admitted prior to trial; this rationale grounded the previously filed mandamus petition.

Indeed, the question is not one of whether the lost evidence would have been persuasive, because a determination of its persuasiveness was and is not feasible. The effect on the verdict of the lost evidence simply cannot be appraised, though the

jury's finding of guilt on a substantially less serious offense than the one charged is worthy of consideration.

The error cannot be viewed as harmless; the error clearly and injuriously affects the Appellant's substantial rights pursuant to Rule 45, Alabama Rules of Appellate Procedure, and a constitutional error is never "harmless" after a determination is made that evidence is material. "Having determined that the undisclosed evidence was material, we cannot apply the harmless error analysis to the facts of this case." Bagley, supra; Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

In partial summary, the failure of the State to provide potentially exculpatory ballistic and photographic evidence which it itself gathered in its prosecution requires reversal of the Appellant's conviction and rendering of a judgment of acquittal. The state admits it lost evidence; it has been demonstrated that this evidence was potentially exculpatory and material; and prejudice to Appellant ensued. The reliability of the jury's verdict is

incalculably undermined when evidence potentially favorable to the accused is withheld, for whatever reason, and it need not be shown that the state acted in bad faith. Nor is this constitutional error harmless. A new trial would serve no useful purpose absent the finding by the state of the evidence it gathered and then lost.

ISSUE II: WHETHER THE TRIAL COURT ABUSED ITS
DISCRETION BY INVOCATION OF THE HABITUAL FELONY
OFFENDER ACT, RESULTING IN AN ILLEGAL SENTENCE?

The Appellant was sentenced illegally in that the invocation of the Habitual Felony Offender Act (§13A- 5-9, Code of Alabama 1975, referred alternately herein as "HFOA") was an improper abuse of the Trial Court's discretion. The constitutional, statutory, and case legal authority on the subject of proper invocation is copious, clear, and unwavering concerning the state's duty to provide to a defendant prior notice of any prior felony convictions it intends to use to enhance the sentence imposed upon the defendant. No such prior notice was provided the Appellant in this case.

Rule 26.6(b)(3)(ii), Alabama Rules of Criminal Procedure, states: "At a reasonable time prior to the [sentencing] hearing, the defendant shall be given notice of the prior conviction or convictions upon which the state intends to proceed." Describing the type of notice required before the HFOA can be

invoked, the Supreme Court of Alabama held in Connolly v. State, 602 So.2d 452, 454 (Ala.1992):

"For the HFOA to apply to a particular sentencing, the State must give reasonable notice, prior to the sentencing hearing, of the State's intention to proceed under the HFOA. Rule 26.6(b)(3), Ala.R.Crim.P. (Formerly Temp. Rule 6(b)(3)(ii), Ala.R.Crim.P.). The notice requirement is eliminated when during the trial the defendant admits the previous felony conviction. Petite v. State, 520 So.2d 207 (Ala.Crim.App.1987)." In the instant case the Appellant has never confessed to any prior felonies.

In Burgin v. State, 824 So.2d 77 (Ala. Crim. App. 2001), this Honorable Court found that the State failed to give proper notice prior to second sentencing hearing of intent to seek enhancement under Habitual Felony Offender Act (HFOA), warranting remand for new sentencing hearing, where the record failed to reflect that state gave defendant notice before hearing that state intended to proceed under HFOA and record did not indicate that state notified

defendant regarding what convictions state would attempt to prove at hearing. (See also Ala. Code 1975, § 13A-5-9). TR-113.

It should be noted that Appellant's counsel was not provided copies of these convictions either at the hearing or at any time before the hearing, or indeed at any time thereafter. The document actually listing the felonies, the "Circuit Criminal Case Action Summary" (State's Exhibits-4), was viewed for the very first time by Appellant when Appellant received the Record on Appeal in this case. The State to this day has never provided him with a copy of this document, which itself is arguably violative of the terms of The Habitual Felony Offender Act, §13A-5-10.1, Code of Alabama 1975, which holds as proof of prior felonies:

(a) Certified copies of case action summary sheets, docket sheets or other records of the court are admissible for the purpose of proving prior convictions of a crime, if the prior conviction is otherwise admissible under the laws of this state.

(b) If the trial court determines that the defendant would be prejudiced by the admission of the documents described in subsection (a) the court may admit into evidence and inform the jury of the fact

of the conviction but not allow the jury to view the prejudicial documents.

In the instant case Appellant had no knowledge of the specific felonies subsequently found in the Record on Appeal until after the commencement of the sentencing hearing.

A sentencing hearing was conducted on 13 July 2005 (CR-002), at which Appellant objected to the introduction of certified copies of convictions by the state's representative, Mr. Smith. TR-113. The following exchange is worthy of inclusion here:

"Mr. Smith: We do have certified copies of Mr. Horne's prior convictions and we would offer them for the record.

Mr. Nickson: I would object to them Your Honor. I did not get prior notice of these whatsoever.

Mr. Smith: Those were filed on Monday or Tuesday, but in many discussions regarding a plea in the matter, it was known to the attorney in our discussions that Mr. Horne had two prior felonies. During the first day of trial we had discussions in which Mr. Nickson was advised that the Defendant had

two prior felonies and we filed a notice and mailed them to him on Monday.

Mr. Nickson: Your Honor, I never received any intent of prior convictions whatsoever. I still have not received any.

The Court: They were filed in-notice of habitual offender status and copies were sent to you on Monday

Mr. Nickson: And as of this day, I have not received it.

The Court: Well, I find that he has had two prior felony convictions.

Mr. Nickson: I would object on that based on failure to notify of intent." TR-113.

Although the state argued, and the Trial Court agreed, that the notice had been filed on Monday 11 July 2005 (TR-113), the document itself (CR-081), as well as the envelope in which it was mailed (on 13 July 2005) show this to be patently false.

Supplemental 3rd Transcript-2.

On or about 15 July 2005, Appellant received via United States Postal Service delivery the state's Notification of Habitual Offender Status (C-81) which

was postmarked as having been mailed on 13 July 2005. A copy of the envelope in which this notice was mailed was both attached to Appellant's 28 July 2005 Motion to Vacate Sentence and also introduced at the sentencing hearing itself. (Supplemental 3rd Transcript-2). While the certificate of service states that the notice was mailed on the 11th of July, it was not filed until the 12th as is shown by the clerk's stamp, and, again, not mailed until the day of sentencing, i.e., the 13th. Supplemental 3rd Transcript-2. The temporal impossibility of prior written notification received by the Appellant having been shown, this Motion further demonstrated that no negotiations ever occurred at any time between Mr. Smith and the undersigned at which prior felonies could have been discussed. CR-078. The Trial Court somehow concluded that the notice had been filed on Monday 11 July 2005, despite the clerk's stamp proving otherwise, as does the case action summary (C-002) which reflects no such filing. Clearly the notice as disclosed in the record could not have

physically been received by the Appellant prior to the 13 July 2005 sentencing hearing.

The State's representative Mr. Smith also argued that because Appellant's counsel "had known" about these two prior felonies "as part of our plea negotiations," then, "If he wanted to investigate them, he's adequate time to do so." TR-114. Again, no meaningful plea negotiations ever occurred, and none of any type ever occurred with Mr. Smith. As will be shown, the awareness or not of a defendant's lawyer of his client's prior felonies does not comply with the specific notice requirement of the statute; moreover the undersigned unequivocally maintains that no discussions whatsoever ever occurred between himself and Mr. Smith. Indeed, if the state met its notice requirement at "plea negotiations," why belatedly mail a written notice at all? As was stated in his Motion to Vacate Sentence (CR-077), the only "plea negotiations" that ever took place at all consisted of very few words exchanged between the undersigned and another representative of the State, which occurred while the case was still at the

District Court level and at which no mention was made whatsoever of any specific prior felonies or of the State's intent to use them in enhancement. CR-78.

This and any controversy regarding what may or may not have been said by whom and when is rendered academic when notice as required by the statute is provided by the state. Conformity to the rule obviates the necessity of any "parol evidence" regarding the substance of any plea negotiations, even assuming that the content of plea negotiations could be used against Appellant, which, as will be shown, is in itself illegal.

Again, it must be reiterated that Appellant's counsel never at any time entered into "plea negotiations" with Mr. Smith despite his contrary assertion in open court; aside from this, yet equally as important, is the fact that the State's attempts to use any imagined plea negotiations as evidence of proper notice is unambiguously proscribed by Rule 410, Alabama Rules of Evidence, which holds:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant

who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere in a federal court or criminal proceeding in another state;
- (3) any statement made in the course of any proceedings under > Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

At any rate, this issue of notice through plea negotiations is ostensibly not subject to review as the Order of the Trial Court seems to be based in no part on the State's claims of what was said at any plea negotiations, unless the issue is one ingredient in some amalgamation upon which the Trial Court found "awareness" by the Appellant of the State's intent, as will be discussed below. As the Trial Court declined to clarify with specificity the notice it found, this cannot be fathomed.

The Trial Court at the sentencing hearing resolved the notice issue by stating simply "I think the State met its obligations on giving notice that he was going to be sentenced as an Habitual Offender and what those two felonies were." TR-114. The Trial

Court declined to specify what notice was given other than the demonstrably false claims of notice by the State. It is noteworthy that the first time that the Appellant received any document whatsoever listing the felonies which the State intended to use to enhance was upon his receiving the Record on Appeal in this action; to this day he has received no document or offer to view such document from the state which lists these alleged prior felonies, only the notice of intent document which he received two days after sentencing.

At the 4 August 2005 hearing on his Motion to Vacate, Appellant implored the Trial Court, if it found notice as required by the statute to have been given, to specify what form the notice took and what time it was provided. TR-142. After the ruling by the Trial Court, which will be discussed immediately below, the Appellant in his "Motion to Clarify Post-Trial Ruling" again beseeched the Court to enlighten him as to what notice was provided. CR-091. This Motion was denied. CR-086. Effectively, then, the only clue as to what notice the Court found to have

been provided lies within this Order of the Trial Court.

The Trial Court disposed of the issue in its "Trial Court's Ruling on Motion for New Trial." CR-084).

In this Order the Trial Court seems to find proper notice by the State of its intent to enhance based on three bases-(1) a presentence report; (2) a "Notice of Habitual Offender Status" filed by the District Attorney listing the State's intent to prove unspecified prior felonies; and (3) a general awareness by the Appellant, the court, the state, and Appellant's counsel that Appellant had two prior felonies. CR-084,085. As will be shown below, the probation report is not, under Alabama law, adequate prior notice of the state's intent to proceed under the HFOA; the notice filed by the District Attorney was not even mailed to Appellant's counsel until the day of the sentencing hearing, making it impossible for it to have been received "prior" to the hearing as required by the rule; and the general "awareness" by the occupants of the courtroom, even if it

existed, of two prior convictions in no way relieves the state of its duty to notify him of the existence of the felonies and also of its intent to proceed thereunder for purposes of the HFOA.

Regarding the presentence report, in Cooper v. State, 632 So. 2d 1342 (Ala. Crim. App. 1993), this Honorable Court clearly and unequivocally held that:

"We do not believe that the presentence report contained in the record, which lists prior convictions, amounted to sufficient notice of the of the felony convictions that the state intended to prove at the sentencing hearing. While we are aware of our holding in Nesbitt v. State, 531 So.2d 37 (Ala.Cr.App.1987), that a defendant's receipt of a presentence report constitutes notice of the state's intent to proceed under the Habitual Felony Offender Act, we are not willing to extend that holding to allow the presentence report to supply sufficient notice of the specific prior convictions upon which the state intends to rely."

This conclusively refutes the Order of the Court insofar as it relies on the presentence report as being sufficient as the state's prior notice of intent; nor is instant case somehow brought within the ambit of Nesbitt. As can readily be seen (CR-055), the presentence report in no way indicates the intent of the state to invoke the convictions listed therein, for purposes of the HFOA, though it does

contain an uncertified "Record of Arrests." CR-056. Alabama law does not recognize a presentence investigation as being sufficient notice by the state of intent to invoke the (uncertified) convictions contained therein; it should be noted that this document was viewed by Appellant only minutes before the sentencing hearing, making the issue of its provision debatable, but academic. Cooper disposes of this issue. This leaves the documentary notice and the Appellant's "awareness."

Regarding the documentary notice provided by the State, as has been shown, the record discloses that the only notice provided was provided at a time which rendered Appellant's receipt thereof impossible prior to the commencement of the sentencing hearing. CR-081; Supplemental 3rd Transcript-2.

This Honorable Court has held that, "Written notice given to the defendant two days prior to his sentencing that the state intended to invoke the provisions of the habitual felony offender statute was reasonable in form and time under subdivision (b) (3) (ii) of former Rule 6." Gratton v. State, 455

So.2d 189 (Ala.Crim.App.1984); the Alabama Supreme Court has held that it is unreasonable to sentence a defendant within fifteen minutes of his receiving notice of the state's intent under the HFOA. Ex Parte Crews, 797 So.2d 1119 (Ala.2000), on remand 797 1123.

These judicially constructed windows of reasonableness, while highly instructive, are not germane to the current inquiry. In this case, Appellant initially received oral notice of the state's intent to invoke the HFOA well after the sentencing hearing had begun, and did not receive written notice until two days after Appellant had been sentenced. While a defendant need not be notified prior to conviction of state's intent to proceed against him as an "habitual felony offender," Holsclaw v. State, 406 So.2d 1019 (Ala.Crim.App.1981), writ denied 406 So.2d 1020, no such absence of notice is prescribed prior to sentencing.

The holdings in Holsclaw and Connolly v. State, 602 So.2d 452 (Ala.1992) (on remand 602 So.2d 457) in no way mitigate or pardon the

impropriety of the complete absence of notice provided in the instant case. Holsclaw held that, "What is required is 'reasonable notice' prior to the sentencing hearing as prescribed by the Alabama supreme court in former A.R.Cr.P., Rule 6(b)(3)(ii), Temporary Rules," while Connolly held that determination of the reasonableness of the notice period is left to the trial judge's discretion, because the trial judge is present and is familiar with the circumstances of the case. Both of these holdings are predicated on facts which are easily distinguishable from the facts of the instant case, in that in those cases some notice, in some form, was afforded the defendant. In the instant case, where none was, the sufficiency of the notice need not be pondered, as none existed whatsoever, the Order of the Trial Court notwithstanding. This leaves only the "awareness" by the Appellant of his own convictions on which the court could base its finding of proper notice.

The Order of the Trial Court found that "the Defendant was aware that he had two prior felony convictions. This has never been disputed." CR-085. The immediate and obvious question is "At what point prior to the sentencing hearing was the Defendant ever afforded an opportunity to dispute the convictions?" The sentencing hearing itself was the first forum at which Appellant had ever been confronted with either the alleged convictions or of the State's intent to use them to enhance; clearly there was no prior notice, after which the convictions could properly have been disputed. No more than a few minutes actually transpired between the point in time at the sentencing hearing that Appellant was first made aware of the state's intent to use the previously undisclosed felonies and the point in time in which the Trial Court found notice to have been given, leaving no time for dispute, much less for investigation into the substance of the allegations.

The Order goes on to state, "In this case, at the time of the Sentencing Hearing the State, the

Defendant, and the Defendant's attorney, and the Court were aware that the Defendant had two prior felony convictions and this has never been disputed. Therefore, the Defendant was properly sentenced as an Habitual Offender." CR-085. With these two sentences, the prior notice requirements of the statute and rule are apparently replaced with a novel standard of "awareness" by the parties and the court, which renders the prior notice duty of the HFOA quaintly obsolete. It is unclear, despite Appellant's pleas for clarification, what constitutes this awareness, but nothing in Alabama case law supports this supplanting of the requirements of the rule and the HFOA with a nebulous, subjective, and disputable standard of knowledge or awareness. A finding of proper notice of the state's intent to enhance under the HFOA by saying, "He knew about them" or "everybody knows about them" is a facile circumvention of the requirements of the rule and the HFOA. While a defendant may be expected to remember his own prior convictions, the law does not mandate his telepathic divination of the state's intent to

use them against him, just as it does not require him to maintain vigil outside the office of the district attorney in hopes of receiving written notice of that intent. The law does provide the defendant with notice so that he may investigate the allegations.

The law requires precisely what it says in the rule, the HFOA, and judicial construction thereof. Under no viewing of the facts were those requirements met in the instant case. Indeed, the finding of this prong of "awareness" seems to indicate that the Trial Court did to some extent credit the state's assertion that notice was provided in plea negotiations, which would be improper. The Order is silent on the subject and unclarified despite Appellant's pleas. Again, Appellant had no opportunity to dispute the existence of any prior felonies prior to the sentencing hearing itself.

It is this finding by the Trial Court of proper notice, where no valid notice whatsoever exists or is disclosed in the record, that is an abuse of the discretion imparted to the trial court in Connolly. This abuse further demands reversal and resentencing

under the legal statutory range of one to ten years incarceration.

CONCLUSION

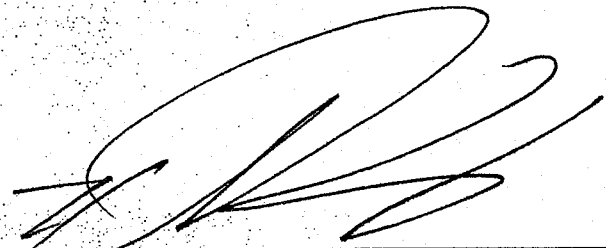
In conclusion of the evidentiary issue, the Trial Court plainly erred in failing to dismiss the action when testimony by law enforcement officers revealed that crucial items of evidence, which were likely exculpatory in character, were gathered by officers at the scene but subsequently and irretrievably lost by the State. Appellant prays that this Honorable Court will reverse the conviction and render a judgment of acquittal; the lost evidence which grounds this appeal remains lost, making a new trial superfluous in that, under applicable and cited law, no conviction can be maintained against Appellant under these circumstances. It is this error without remedy for which Appellant respectfully prays reversal and rendering.

In conclusion of the sentencing issue, the Trial Court abused its discretion by sentencing the Appellant under the Habitual Felony Offender Act

despite the record overwhelmingly showing that Appellant was afforded no prior notice whatsoever of the intent of the State to seek such enhancement. This abuse of discretion requires reversal and resentencing under the legal statutory range of one to ten years incarceration, and it is this reversal and remand for proper sentencing for which Appellant now respectfully prays.

Respectfully submitted this the ____ day of

_____, 200__.



N. TRACY NICKSON (NIC026)
COUNSEL FOR APPELLANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36606
334) 285-1776

DOCKET NUMBER:

IN THE ALABAMA COURT OF CRIMINAL APPEALS

GARY HORNE,
APPELLANT,

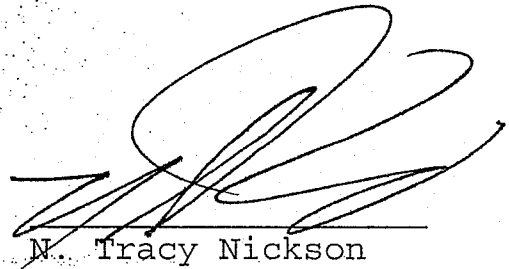
v.

STATE OF ALABAMA,
APPELLEE.

From the Circuit Court of Dale County, Alabama
Case No. CC-2004-1220

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon the following parties to the action by placing a copy in the U.S. Mail, first class, postage pre-paid on this ____ day of _____, 2005.



N. Tracy Nickson

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Room 410
Montgomery, AL 36310

Appendix I

Following are actions taken by the trial court which are adverse to the Appellant and which ground the instant appeal:

1. The 16 December 2004 Order of the Trial Court (CR-002) which denied the Motion to Dismiss filed by Appellant on 3 September 2004. CR-095.
2. The 13 July 2005 Order of the Trial Court (CR-084) which denied the Motion to Vacate Sentence filed by Appellant on 28 July 2005. CR-077.
3. The 13 July 2005 Order of the Trial Court (CR-084) which denied the Motion for New Trial filed by Appellant on 21 June 2005. CR-074.

APPENDIX II

The following "Motion to Preserve Evidence" was both filed with the Dale County Circuit Clerk on the date stamped, i.e., 27 April 2004, and also was attached as Exhibit 5 to Appellant's Petition for Writ of Mandamus, which itself was filed with this Honorable Court on 30 December 2004, Alabama Criminal Appeals Number CR-04-0545.

DEC 30 2004

CLERK
ALA COURT CRIMINAL APPEALS

PETITION FOR WRIT OF MANDAMUS

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

Ex Parte: GARY HORNE,

Case No.: _____

PETITIONER

RE: STATE OF ALABAMA
Plaintiff,

v.

GARY HORNE,
Respondent.

Dale County Circuit Court Case No. CC-2004-122

ORIGINATING IN THE DALE COUNTY CIRCUIT COURT

N. TRACY NICKSON
COUNSEL FOR PETITIONER
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

ORAL ARGUMENT REQUESTED

EXHIBIT 5

IN THE DISTRICT COURT OF DALE COUNTY, ALABAMA

CRIMINAL DIVISION

STATE OF ALABAMA,
Plaintiff,

vs.

WILLIAM DASSINGER,
Defendant.

)
)
)
)
)
)
)

CASE NO.: DC-2004-213

MOTION TO PRESERVE EVIDENCE

COMES NOW, Gary Horne, by and through his attorney N. Tracy Nickson, who is the Defendant in Case No. CC-2004-1220, in the Circuit Court of Dale County, and respectfully requests that this Honorable Court will preserve certain evidence in the above styled action for inspection and/or testing by defense counsel in Mr. Horne's case; as grounds he states as follows:

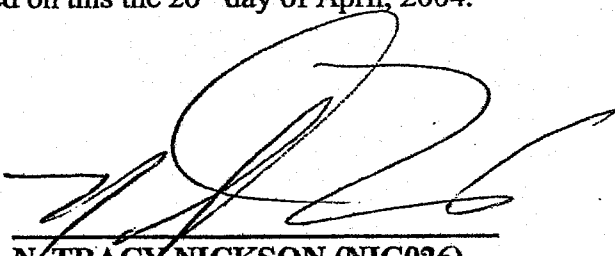
1. William Dassinger currently faces charges of, *inter alia*, possession of an altered handgun in this Honorable Court.
2. Gary Horne, represented by the undersigned, currently faces a charge of Attempted Murder in Dale County Circuit Court.
3. The investigation currently being conducted by the undersigned indicates a strong possibility that the firearm at issue in Mr. Dassinger's case, a semiautomatic .40 caliber handgun, was purchased by Mr. Dassinger from the alleged victim in Mr. Horne's case shortly after the act for which Mr. Horne faces charge.
4. If indeed the handgun for which Mr. Dassinger is charged is the same used in the crime for which Mr. Horne is charged, the effect would be so exculpatory as to Mr. Horne as to

completely absolve him of the charge, and moreover would in all likelihood result in a criminal investigation of the alleged victim in Mr. Horne's case.

5. This request is made pursuant to the authorities expounded in Brady v. Maryland, 373 U.S. 83, Giglio v. United States, 405 U.S. 150,; Naque v. Illinois, 360 U.S. 264; United States v. Tashman, 478 FR.2d 129 (5 Cir. 1973.).

WHEREFORE, THESE PREMISES CONSIDERED, the undersigned respectfully requests that this Honorable Court will preserve the above described evidence for inspection and/or testing by counsel for the Defendant.

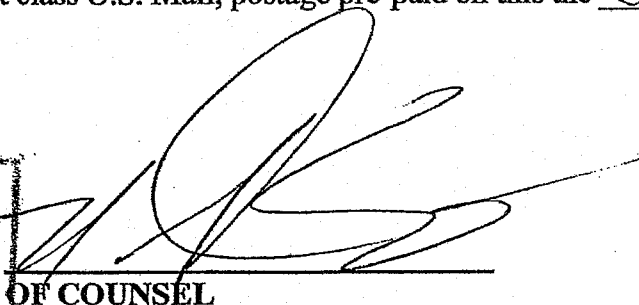
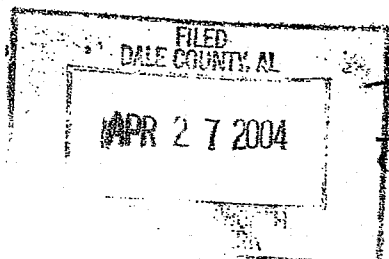
RESPECTFULLY submitted on this the 26th day of April, 2004.



N. TRACY NICKSON (NIC026)
ATTORNEY FOR DEFENDANT
2181 AA COBBS FORD ROAD
PRATTVILLE, ALABAMA 36066
(334) 285-1776

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document has been served upon the offices of the Dale County District Attorney and upon the Hon. Circuit Judge K.W. Quattlebaum by placing same in his/her box and or by first class U.S. Mail, postage pre-paid on this the 26th of April 2004.



OF COUNSEL

Exhibit C

No. CR-04-2461

*In the COURT of CRIMINAL APPEALS
of ALABAMA*

GARY HORNE,

Appellant,

v.

STATE OF ALABAMA,

Appellee.

*On Appeal From the Circuit Court of
Dale County (CC-04-1220)*

BRIEF OF APPELLEE

Troy King
Attorney General

Robin Blevins Scales
Assistant Attorney General

John Porter
Assistant Attorney General
*Counsel of Record **

State of Alabama
Office of the Attorney General
11 South Union Street
(334) 242-7300*

December 5 2005



STATEMENT REGARDING ORAL ARGUMENT

The State of Alabama does not request oral argument.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT.....	i
TABLE OF CONTENTS.....	ii
TABLE OF CASES AND AUTHORITIES.....	iii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE FACTS.....	3
STANDARDS OF REVIEW.....	6
SUMMARY OF THE ARGUMENT.....	7
ARGUMENTS.....	9
I. Horne's Argument That His Due Process Rights Were Violated Because The State Lost Potentially Exculpatory Evidence Is Without Merit Because He Has Failed To Show That The State Acted In Bad Faith Or That Such Evidence Was So Critical To His Defense That His Trial Was Fundamentally Unfair.....	9
II The Trial Court Did Not Abuse Its Discretion When It Determined That Horne Received Adequate Notice Under The Habitual Felony Offender Act.....	17
CONCLUSION.....	22
CERTIFICATE OF SERVICE.....	23

TABLE OF CASES AND AUTHORITIES

Cases

<u>Arizona v. Youngblood</u> , 488 U.S. 51, 55-58 (1988).....	10
<u>Berry v. State</u> , 630 So. 2d 131, 132 (Ala. Crim. App. 1993)	21
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963).....	9
<u>California v. Trombetta</u> , 467 U.S. 479, 486 (1984).....	10
<u>Connolly v. State</u> , 602 So. 2d 452, 454-55 (Ala. 1992)....	17
<u>Cooper v. State</u> , 632 So. 2d 1342, 1344 (Ala. Crim. App. 1993)	18
<u>Ex parte Gingo</u> , 605 So. 2d 1237, 1241 (Ala. 1992).....	11
<u>Ex parte Rieber</u> , 663 So. 2d 999, 1014-15 (Ala. 1995).....	13
<u>Gurley v. State</u> , 639 So. 2d 557 (Ala. Crim. App. 1993)...	12
<u>Hobson v. State</u> , 625 So. 2d 1168, 1170 (Ala. Crim. App. 1993)	20
<u>Jones v. State</u> , 625 So. 2d 1167, 1168 (Ala. Crim. App. 1993)	20
<u>May v. State</u> , 710 So. 2d 1362, 1369 (Ala. Crim. App. 1997)	12
<u>R.J.S. v. State</u> , 905 So. 2d 26, 31 (Ala. Crim. App. 2004)	20
<u>Weaver v. State</u> , 500 So. 2d 1278, 1279 (Ala. Crim. App. 1986)	15
<u>Williams v. State</u> , 616 So. 2d 374, 376 (Ala. Crim. App. 1993)	20

STATEMENT OF THE CASE

This is the direct appeal from a conviction for assault in the second degree. The Honorable P.B. McLauchlin, Jr. presided.

On March 3, 2004, the appellant, Gary Horne, was indicted by the Dale County Grand Jury for attempted murder by shooting John Williams with a handgun. (C. 34-35) On September 3, 2004, Horne moved to dismiss the charges against him, arguing that the State had lost evidence that was "crucial to the defense." (C. 95-97; RS2. 2)¹ Specifically, Horne argued that the State had lost a bullet which was "strongly believed" to have been shot from a gun allegedly sold by the victim, John Williams, shortly after the actions serving as the basis for the prosecution against Horne were committed. (C. 95; RS2. 2-12, 16) Horne also argued that photographs taken of the scene were unavailable. (C. 96; RS2. 13-15) Judge McLauchlin denied Horne's motion to dismiss on December 16, 2004. (C. 2)

Horne was tried before a jury, beginning on May 16, 2005. (R. 1-111) On May 18, 2005, the jury found Horne

¹ References to the hearing on Horne's motion to dismiss, contained in the "Second Supplemental" record on appeal, are designated by "RS2".

guilty of the lesser included offense of assault in the second degree. (C. 2)

On July 14, 2005, Judge McLauchlin sentenced Horne according to the Habitual Felony Offender Act ("HFOA") based upon two prior felonies to twenty-two years' imprisonment. (C. 2; R. 123-124) At the sentencing hearing, Horne, through his attorney, objected to the State's alleged failure to give sufficient notice of the two prior felonies used to enhance his sentence. (R. 112-114) Judge McLauchlin ruled that the State had given sufficient notice of the two felonies. (R. 114) Horne filed a motion for new trial on July 28, 2005, which Judge McLauchlin denied after a hearing on August 19, 2005. (C. 8-9; R. 125-142) Horne timely filed a notice of appeal on August 29, 2005. (C. 87-88)

STATEMENT OF THE ISSUES

1. Is Horne's argument that his due process rights were violated because the State lost potentially exculpatory evidence without merit because he has failed to show that the State acted in bad faith or that such

evidence was so critical to his defense that his trial was fundamentally unfair?

2. Did the trial court abuse its discretion when it determined that Horne received adequate notice under the Habitual Felony Offender Act?

STATEMENT OF THE FACTS

John Williams testified that, on January 15, 2004, he was visiting the house of the appellant, Gary Horne, where he played X-Box video games. (R. 9-10) Present at the house that day along with Horne and Williams were Immogene Kesha Paul, Horne's girlfriend; Shanice Horne, Horne's sister and the mother of Williams's son; Williams's son; and, Terrance Bar. (R. 10, 52-53)

While Williams was playing video games with Horne, Williams's wife at the time, Christina Patterson Williams, arrived. (R. 10-11, 41) After Paul accidentally pressed the "send" button when borrowing Williams's cell phone and hung up without saying anything, Christina thought her husband had called and went to Horne's house to check on him. (R. 41-42, 69) When she arrived, she angrily told Williams that "[i]t's time to go." (R. 11-12)

While Williams looked for his keys and pager, Shanice, who felt that Williams had left her for Christina, hit him in the face. (R. 11-12) Williams and Shanice began "tussling" in the kitchen; Williams, in the process, grabbing Shanice to prevent her from hitting him again.

(R. 12) After they fell over the kitchen table and into a corner, Horne began pushing Williams. (R. 13) As Williams "rushed" Horne back into the refrigerator, Horne asked him "what the hell [he thought he was] doing." (R. 13)

Williams decided to leave and, as he was trying to get to his car, Shanice "kept trying to fight on [him]." (R. 13) When he got into his car, Shanice tried to open the door. (R. 13)

After he finally was able to leave Horne's house, Williams saw Christina following him and Shanice following her. (R. 14) Thinking it would be a safe haven from the "foolishness" that had been taking place, Williams drove to Arrowhead Apartments where his mother lived. (R. 14) On the way he called Horne. (R. 14) While he thought things had calmed down between them, he told Horne that he thought it was "messed up the way [he] handled the situation." (R. 14) Horne then stated, "I'll fuck you up, nigger, you

don't know me," repeating what he was planning on doing to Williams. (R. 14) When Williams responded, "You know I'll beat your ass," Horne asked him where he was. (R. 14) Not thinking Horne would actually come, Williams replied, "Come to Arrowhead." (R. 14)

After parking in the Arrowhead Apartments parking lot, Williams noticed that Christina had parked in the adjacent spot and Shanice parked in the closest available spot. (R. 15) Shanice, however, started her car again and pulled in right behind Williams, blocking Williams from being able to leave. (R. 15) Williams continued to sit in his car, realizing that his mother did not want people there "acting up." (R. 16) Williams then saw Horne's car "shoot up into the apartment complex" and park in the spot Shanice had initially parked in. (R. 16) As Williams got out of his car and stood on the curb in front of Christina's car, he noticed that Horne was carrying a gun. (R. 16) When Williams stated, "You got a gun, you're tough now," Horne began "talking smack," asking Williams, "What the fuck did you have your wife come to my house for in front of my sister?" (R. 17) When Horne pushed him, Williams fell back and tried to swing back. (R. 19) As his hand grazed

Horne's chin, Horne shot Williams in his right side. (R. 19-20) Horne then stood over Williams, stating, "I should kill this fuck nigger." (R. 20) After Terrance Bar, who had arrived with Horne, said, "Come on, my nigger, let's go," they both ran from the scene. (R. 23)

Williams was taken to the Dale Medical Center where he received treatment for a week, including two surgeries. (R. 21) After having been shot he has suffered severe back pain as well as pain while urinating. (R. 22) Williams denied having any gun on the night he was shot and denied ever owning a 40-caliber Glock. (R. 27, 29)

STANDARDS OF REVIEW

1. Whether a trial court's denial of a motion to dismiss was error is reviewed under an abuse-of-discretion standard. Raper v. State, 584 So. 2d 544, 548 (Ala. Crim. App. 1991).

2. Whether notice under the Habitual Felony Offender Act is reasonable should be left to the discretion of the trial judge, who is familiar with the surrounding circumstances. Connolly v. State, 602 So. 2d 452, 454 (Ala. 1992).

SUMMARY OF THE ARGUMENT

1. The State did not violate Horne's due process rights when it lost evidence which, according to Horne, was potentially exculpatory. Unlike in the Brady² situation where the State fails to disclose exculpatory evidence, when the State loses evidence before its exculpatory value can be determined, a defendant must show either that the State acted in bad faith or that the lost evidence was so critical to his defense that his trial was fundamentally unfair. Horne admits that no bad faith occurred in this case and fails to show that the lost evidence was so critical to his case that his trial was fundamentally unfair.

Horne claims that the preservation of a gun, bullet, and photographs might have proved his self-defense claim. Horne, however, failed to present any substantial evidence at trial that he acted in self-defense. Indeed, the

² Brady v. Maryland, 373 U.S. 83 (1963).

undisputed evidence at trial showed that he was the initial aggressor in the confrontation leading to the shooting of the victim. Horne has failed to even allege how the gun, bullet, and photographs could have established that he was not the initial aggressor. Furthermore, the State presented overwhelming evidence unrelated to the lost evidence showing that Horne was not acting in self-defense when he shot Williams. Accordingly, Horne has failed to show that his due process rights were violated when the evidence was lost.

2. Horne received sufficient notice under the Habitual Felony Offender Act. Not only was a presentence report listing the felonies relied upon to enhance his sentence available, but the trial court concluded from the circumstances surrounding the discussions between the parties that Horne and his attorney were aware of such prior felonies and that Horne did receive sufficient notice.

ARGUMENTS

I. Horne's Argument That His Due Process Rights Were Violated Because The State Lost Potentially Exculpatory Evidence Is Without Merit Because He Has Failed To Show That The State Acted In Bad Faith Or That Such Evidence Was So Critical To His Defense That His Trial Was Fundamentally Unfair.

Horne argues that the trial court erred in denying his motion to dismiss because the State violated his due process rights when it lost potentially exculpatory evidence. Brief of the Appellant, pp. 10-25.

Specifically, Horne argues that the State lost a bullet, gun, and photographs which, according to him, were crucial to his self-defense claim. Id. Because Horne failed to show that the State acted in bad faith or that the lost evidence was so critical to his defense that his trial was fundamentally unfair, however, he has failed to show that any due process violation occurred.

In arguing that his conviction is due to be reversed because the State lost potentially exculpatory evidence, Horne erroneously relies upon Brady v. Maryland, 373 U.S. 83 (1963), in which the United States Supreme Court set the requirement that the State must disclose exculpatory evidence to a defendant. Brief of the Appellant, pp. 13-

20. In Arizona v. Youngblood, 488 U.S. 51, 55-58 (1988), that Court distinguished the Brady situation from cases in which evidence had been lost or destroyed before the exculpatory value of such evidence could be determined.

While the Court acknowledged that the good or bad faith of the State was irrelevant when the State failed to disclose evidence that had been determined to have been material and exculpatory, it emphasized that a different standard should apply when the State failed "to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Id. at 57. As the Court, quoting California v. Trombetta, 467 U.S. 479, 486 (1984), explained, "[w]henver potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." For this reason, the Court held that the State was not required to preserve all material that had any "conceivable evidentiary significance" and that a defendant alleging that his due process rights had been violated because of lost evidence

that was potentially exculpatory had to show that the police acted in bad faith. 488 U.S. at 58.

Although Alabama courts must follow the rule expressed in Youngblood when interpreting the federal due process clause and when setting a minimum standard for state constitutional rights, states are permitted to give defendants more constitutional protection and, indeed, the Alabama Supreme Court appears to have done so in Ex parte Gingo, 605 So. 2d 1237, 1241 (Ala. 1992). Relying on Justice Stevens's concurring opinion in Youngblood, the Ex parte Gingo Court held that a defendant could show a due process violation even under certain circumstances where the State lost potentially exculpatory evidence without any bad faith. Id. at 1241. Quoting Justice Stevens's opinion, the Court stated that Gingo's case fell within the class of "cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." Id., quoting Youngblood, 488 U.S. at 61 (Stevens, J., concurring in the result). While this Court interpreted the Ex parte Gingo framework in Gurley v. State, 639 So. 2d

557 (Ala. Crim. App. 1993), the State respectfully disagrees with this Court's conclusion that the Alabama Supreme Court replaced the Youngblood one-step analysis with a three-part balancing test. According to this Court in Gurley, "[t]his three-part analysis - which weighs culpability, materiality, and prejudice - is what the Alabama Supreme Court seems to have employed in Ex parte Gingo." 639 So. 2d at 567. Rather than rejecting Youngblood and creating a balancing test, however, it appears that the Alabama Supreme Court added to Youngblood an alternative method under which a defendant could show a due process violation through lost potentially exculpatory evidence. Not only could a defendant establish a due process violation by showing the State's bad faith, but also by showing that the lost evidence was "so critical to the defense as to make a criminal trial fundamentally unfair." This analysis comports with this Court's conclusion in May v. State, 710 So. 2d 1362, 1369 (Ala. Crim. App. 1997), that the Ex parte Gingo Court "adopted" Youngblood and "additionally recognized that a defendant's right to due process can be violated when the loss or destruction is of evidence so critical to the defense that

its loss or destruction makes the trial fundamentally unfair." See also Ex parte Rieber, 663 So. 2d 999, 1014-15 (Ala. 1995) ("We further note that even in those cases where evidence is actually lost or destroyed by the police and, thus, is unavailable for inspection and testing by the defendant, there is no due process violation unless the police acted in bad faith in handling the evidence or the evidence destroyed was so critical to the defense that its destruction renders the trial fundamentally unfair."). Accordingly, Horne can show that his due process rights were violated either by showing that the police acted in bad faith or by showing that the lost bullet, gun, and photographs were so critical to his defense that their being lost rendered his trial fundamentally unfair.

Because Horne has conceded that the State did not act in bad faith, he must show that the loss of the bullet, gun, and photographs rendered his trial fundamentally unfair. See Brief of the Appellant, pp. 16-17 ("While the loss of the potentially exculpatory evidence seems in this instance to be truly inadvertent, it was inarguably negligent."). Horne, however, has failed to show any non-speculative connection between the lost evidence and his

self-defense claim. Indeed, proving such a connection is made problematical by the fact that Horne presented virtually no evidence at trial that he shot Williams in self-defense. According to Horne, the 40-caliber bullet collected at the scene might match a gun allegedly sold by Williams shortly after he was shot. Brief of the Appellant, pp. 10-12. Horne's argument follows that the bullet, gun, and photographs, had they been preserved, would have supported his self-defense argument by showing that Williams was the one who brought a weapon to the scene and, in fact, was shot with his own gun. Brief of the Appellant, pp. 12-13.

The evidence indicating that Williams sold a gun shortly after being shot, however, is questionable. Although John William Dassinger testified that Williams sold him a Glock-40 pistol in late January of 2004, he also testified that the pistol had been confiscated when he was arrested for possession of marijuana. (R. 83-84, 87) Dassinger, who at the time of trial considered himself Horne's friend, was charged with possession of a controlled substance and an altered pistol. (R. 87-88) Most importantly, even if the jury were to believe that Williams

sold Dassinger the pistol, it would still have to speculate if and how the pistol was used in the confrontation between Horne and Williams. Although Horne asks this Court to infer that Williams brought the pistol to the scene and that he was somehow shot with his own gun, there was no evidence at trial from which the jury could even infer such a conclusion. The undisputed evidence at trial showed that Williams was trying to avoid confrontation by driving to his mother's apartment. (R. 14) The evidence, furthermore, showed that Horne, provoked merely by a couple of ill-advised comments made by Williams, followed Williams to where his car had been blocked. (R. 14) Even if the gun and bullet had been preserved and forensics had been able to show that the gun was somehow used during the confrontation, any inference that Williams confronted Horne with the gun and that Horne somehow grabbed the gun from Williams and shot him with it to avoid suffering serious bodily injury is not only based upon pure speculation, but contradicts the undisputed evidence presented at trial that Horne was the initial aggressor. As this Court stated in Weaver v. State, 500 So. 2d 1278, 1279 (Ala. Crim. App. 1986):

"To justify conduct through a claim of self defense the accused must neither provoke nor encourage the difficulty" Finchum v. State, 461 So. 2d 37, 39 (Ala. Cr. App. 1984)(citations omitted). "[O]ne who claims justification in the use of force must not have brought on the necessity of using it; he must have been entirely free from fault." Commentary to Alabama Code 1975, § 13A-3-23."

Horne has failed to even allege how the preservation of the evidence in question could have proved that he was not the initial aggressor and that he merely shot Williams in self-defense.

The present case is distinguishable from the situation involved in Ex parte Gingo. In that case, the State, in its case-in-chief, relied upon test results of what was believed to have been hazardous waste samples to prove hazardous waste violations. 605 So. 2d at 1240. Although the samples were destroyed through no bad faith, because they had been destroyed, Gingo had no way of refuting the test results. Id. Accordingly, the Court held that, because the samples were so critical that their loss rendered Gingo's trial fundamentally unfair, Gingo's due process rights had been violated. Id. at 1241. On the other hand, the State in this case did not even attempt to use the gun at issue in its prosecution of Horne and, even

without the gun, bullet, and photographs, the State presented overwhelming evidence of Horne's guilt and lack of self-defense. Because Horne has failed to show that the loss of this evidence rendered his trial fundamentally unfair, he has failed to show that his due process rights were violated.

II. The Trial Court Did Not Abuse Its Discretion When It Determined That Horne Received Adequate Notice Under The Habitual Felony Offender Act.

Horne argues that his sentence was illegal because he did not receive proper notice under the Habitual Felony Offender Act ("HFOA"). Brief of the Appellant, pp. 26-45. Before the trial court may sentence a defendant under the HFOA, the State is required to give the defendant prior notice of its intention to proceed under the HFOA as well as notice of the specific prior felonies it intends to prove. Connolly v. State, 602 So. 2d 452, 454-55 (Ala. 1992). As Horne argues, the record appears to reflect that the document entitled "Notification of Habitual Offender Status" was mailed to Horne's attorney on the day of sentencing and, accordingly, could not have provided timely

notice. (C. 77-81; C3. 2)³ Because the trial court had sufficient basis upon which to determine that both of the notice requirements were satisfied, however, Horne's sentence should be affirmed.

The requirement that the State give a defendant notice of its intent to proceed under the HFOA may be satisfied by the service of a presentence report on a defendant listing that defendant's prior convictions. Cooper v. State, 632 So. 2d 1342, 1344 (Ala. Crim. App. 1993). Such a presentence report, the availability of which Horne does not dispute, is included in the record and lists the two felonies used to enhance his sentence. (C. 55-60) The State, furthermore, respectfully requests this Court to reconsider its holding in Cooper, 632 So. 2d at 1344, that such a presentence report cannot serve as the notice of the specific felonies to be used, especially when the report lists the felonies to be used and use of such felonies is mandatory when the State is aware of them. See Connolly, 602 So. 2d at 455 (State under duty to attempt to prove prior felonies of which it becomes aware).

³ References to the portion of the clerk's record contained in the "Supplemental 3rd" record are designated by "C3".

Even if the presentence report does not provide adequate notice, however, the trial court had a sufficient basis to conclude that Horne did, in fact, receive timely notice. At the sentencing hearing, the State's attorney stated that:

[I]n many discussions regarding a plea in this matter, it was known to the attorney in our discussions that Mr. Horne had two prior felonies. During the first day of trial we had discussions in which Mr. Nickson [Horne's attorney] was advised that the Defendant had two prior felonies.

(R. 113) Although Horne disputes that any substantial plea discussions ever took place, he has not disputed that the prior felonies were mentioned during any discussions.

Indeed, he appears to concede that he, his attorney, the State's attorney, and the trial court were all aware of the two felonies to be used to enhance his sentence. Brief of the Appellant, pp. 38-43.

Rather than dispute his awareness of his prior felonies, Horne argues that such awareness cannot serve as evidence that he received proper notice under the HFOA. Brief of the Appellant, pp. 38-43. This Court, however, has inferred numerous times from a defendant's or his attorney's awareness of prior felonies that proper notice

had been given. See Williams v. State, 616 So. 2d 374, 376 (Ala. Crim. App. 1993) ("Here, at the sentencing hearing, the appellant's trial counsel appeared to be familiar with the appellant's prior convictions, and made specific objections relating to the use of several of appellant's prior convictions."); R.J.S. v. State, 905 So. 2d 26, 31 (Ala. Crim. App. 2004) ("[O]ur review of the record reveals that R.J.S. knew before the sentencing hearing that the State intended to use this prior Indiana conviction because his attorney introduced a copy of the pertinent statute from Indiana and argued that R.J.S.'s Indiana conviction did not constitute a felony under Alabama law."); Jones v. State, 625 So. 2d 1167, 1168 (Ala. Crim. App. 1993) ("The appellant's trial counsel testified that both he and the appellant were aware of the prior qualifying felony before trial and that they had discussed at that time its possible use by the State for impeachment purposes."); and Hobson v. State, 625 So. 2d 1168, 1170 (Ala. Crim. App. 1993) ("It appears that the appellant was fully aware that the State intended to proceed under the Habitual Felony Offender Act and of what prior felony would be used to enhance his sentence."). Although the State's attempt at providing

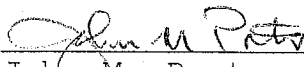
written notice appears to have been untimely, oral notice is sufficient. Connolly, 602 So. 2d at 452. Indeed, such notice may be "informal". Berry v. State, 630 So. 2d 131, 132 (Ala. Crim. App. 1993). Furthermore, whether the notice is reasonable should be determined by the trial judge, who is familiar with the surrounding circumstances. The trial court in this case found that all parties, including Horne, were aware of his two prior felonies and that Horne had received proper notice under the HFOA. Accordingly, Horne's sentence should be affirmed.

CONCLUSION

Based on the foregoing, Horne's conviction and sentence should be affirmed.

Respectfully submitted,

Troy King
Attorney General



John M. Porter
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify on this 5th day of December, 2005, I served a copy of the foregoing on the attorney for Horne, by placing the same in the United States Mail, first class, postage prepaid and addressed as follows:

N. Tracy Nickson
2181 AA Cobbs Ford Road
Prattville, Alabama 36066



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230151/85302-001

Exhibit D

Porter

85302

DOCKET NUMBER: CR-04-2461

IN THE ALABAMA COURT OF CRIMINAL APPEALS

GARY HORNE,
APPELLANT,

v.

STATE OF ALABAMA,
APPELLEE.

From the Circuit Court of Dale County, Alabama
Case No. CC-2004-1220

REPLY BRIEF OF THE APPELLANT

N. TRACY NICKSON
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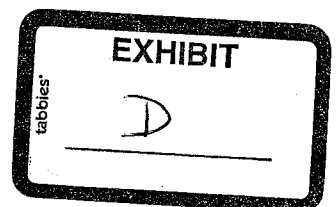


TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	9
CONCLUSION	26
CERTIFICATE OF SERVICE	28

TABLE OF AUTHORITIESALABAMA CASES

<u>Connolly v. State</u> , 602 So. 2d 452 (Ala.1992)	26
<u>Cooper v. State</u> , 632 So. 2d 1342 (Ala. Crim. App. 1993)	6
<u>Grissom v. State</u> , 624 So. 2d 706 (Ala. Crim. App 1993)	11
<u>Gurley v. State</u> , 639 So.2d 557 (Ala. Crim. App. 1993)	11
<u>Hobson v. State</u> , 625 So. 2d 1168 (Ala. Crim. App.)	21
<u>Jefferson v. State</u> , 645 So. 2d 313 (Ala. Crim. App. 1994)	10
<u>Jones v. State</u> , 625 So. 2d 1167 (Ala. Crim. App. 1993)	20
<u>Nesbitt v. State</u> , 531 So. 2d 37 (Ala.Cr.App.1987)	19
<u>R.J.S. v. State</u> , 905 So. 2d 26 (Ala. Crim. App. 2004),	20
<u>Williams v. State</u> , 616 So. 2d 374 (Ala. Crim. App. 1993),	19

FEDERAL CASES

Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333,
102 L.Ed.2d 281 (1988) 11

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194,
10 L.Ed.2d 215 (1963) 6

Giglio v. United States, 405 U.S. 150, 154
[92 S.Ct. 763, 766, 31 L.Ed.2d 104] (1972) 11

United States v. Bagley, 473 U.S. 667,
105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) 10

STATUTORY AUTHORITY

Rule 26.6(b)(3), Alabama Rules
of Criminal Procedure 17

Rule 401, Alabama Rules
of Evidence 7

SUMMARY OF THE ARGUMENT

By asking this Honorable Court to reverse its holdings in Gingo and Cooper, infra, the State implicitly admits that the conviction and the sentence from which Appellant appeals cannot be maintained under the terms of those holdings. Appellant will now reply to the brief of Appellee.

1. Because the State lost potentially exculpatory evidence that it itself gathered, a fair trial under Alabama law was not possible, nor can a verdict against the Appellant be maintained.

The Appellant, tried on the charge of Attempted Murder, was convicted of Assault Second Degree, with the jury rejecting the State's contention that Appellant intended to murder anyone. This fact alone greatly magnifies the potential value of the evidence which the State concedes it lost if it could be shown to be exculpatory, which, given the ballistic nature of the exculpatory evidence and its permanent unavailability, is impossible. As will be shown, there is no requirement that Appellant prove bad faith on the part of the State in order to invoke the

due process protections afforded the Appellant under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). As will be reiterated, when the exculpatory value of lost evidence cannot be assessed, and in a verdict this disparate from the crime charged, this should logically not work to the State's benefit, as it was the State's negligence which caused the exculpatory items to be lost despite numerous pleas by the Appellant for the preservation of the evidence.

2. The State's adoption of the Trial Court's novel and nebulous standard of "awareness" as sufficing for the specifically defined prior notice required by the statute regarding the invocation of the Habitual Felony Offender Act (HFOA), and its further citation of authority which it simultaneously asks this Honorable Court to invalidate (Cooper v. State, 632 So. 2d 1342 (Ala. Crim. App. 1993), is absolutely devoid of merit. The record discloses the provision of no notice whatsoever by the State of its intent to invoke the HFOA until after the commencement of the

sentencing hearing. While the State argues that Appellant has "conceded" that it was aware of the two prior felonies, no such concession has ever been made, as the record clearly reveals. Again, no plea discussions ever took place at which the State's representative at sentencing was even present, and certainly none at any time at which any specific prior felonies were discussed. The credibility of State's memory regarding any aspect of the notice requirement is automatically suspect, considering it erroneously stated in open court that it sent notice to Appellant on a Monday, (TR-113), when actually it was not filed until Tuesday (CR-081), and mailed the following Wednesday. Supplemental 3rd Transcript-2.

Moreover, pursuant to Rule 410, Alabama Rules of Evidence, the substance of plea negotiations cannot be used against the Appellant. This was discussed at length in Appellant's initial brief.

However, Appellant maintains that specific felonies were never discussed at any plea negotiations, which plea negotiations never took place with any seriousness, and maintains that the

first notice it received of either the prior felonies or the State's intent to invoke them occurred well into the sentencing hearing. As the record clearly and uncontrovertedly shows, no notice whatsoever of the State's intent to enhance under the HFOA was ever provided, in any form, at any time, prior to the sentencing hearing.

ARGUMENT

1. It is undisputed that the State lost evidence which it itself collected in its prosecution of the Appellant. It is further undisputed that Appellant specifically implored the State to preserve this evidence, recognizing that the evidence could exonerate him completely.

The State in its brief dwells at inordinate length upon the facts of the case as adduced at trial. The only material denouement of this recitation relevant to the current inquiry is that the jury flatly rejected the State's charge of attempted murder, which both renders the State's tautological reference throughout its brief to the "overwhelming evidence" adduced, dubiously unsupported; and, perhaps more importantly, also renders the lost evidence of ineffably greater significance in creating the possibility of a different verdict. "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different.'" United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

The State apparently and curiously characterizes crime scene photographs, taken by the State on the night of the act in its prosecution of the case, as non-crucial evidence. The inaccuracy of this appraisal seems self evident; and the potential value to the defense of the photographs, the bullet and the gun have been shown throughout the record in this case. Reference is hereby made to Appellant's "Motion to Dismiss," CR-95, "Motion to Vacate" CR-77, and generally to the initial brief filed by Appellant in this case.

At trial the only eyewitnesses testifying that Appellant was the initial aggressor were John Williams (TR-19), who was shot, and his wife Christina Patterson. TR-43. Williams's testimony was predictable, leaving his wife's more subject to legitimate impeachment. Photographs showing the darkness of the scene would have almost certainly aided in this impeachment. . . Jefferson v. State, 645

So. 2d 313 (Ala. Crim. App. 1994), holds "Impeachment evidence ... as well as exculpatory evidence, falls within the *Brady* rule."

However, the inquiry does not end there regarding the photographs, which may have disclosed other exculpatory evidence. As with all the items, their exculpatory effect can never be adequately assessed, leaving the question of the cruciality of the evidence perennially unanswerable. It is not fair to answer that it could not be crucial, thus rewarding the State's negligence, and depriving the Appellant of a defense which, had the State preserved and disclosed, could have in all likelihood exonerated him completely.

Fortunately, under the holdings in Gurley v. State, 639 So.2d 557 (Ala. Crim. App. 1993), Jefferson v. State, 645 So. 2d 313 (Ala. Crim. App. 1994), Grissom v. State, 624 So.2d 706 (1993), Ex parte Gingo, 605 So.2d 1237 (Ala. 1992), Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), Brady v. Maryland, supra, and Giglio v. United States, 405 U.S. 150, 154 [92 S.Ct. 763, 766,

31 L.Ed.2d 104] (1972), among others, the loss of the evidence does not work to the State's advantage, and indeed precludes a verdict against the Appellant. The holdings in these cases are more meticulously parsed and concatenated to the facts of the instant case within Appellant's initial brief.

The Appellant respectfully submits that every case cited by the Appellee in its brief unambiguously supports the foreclosure of a verdict against the Appellant, and demands reversal of the current conviction.

The State argues that no evidence at trial was presented from which a jury could even infer the conclusion that Williams was shot with his own gun .Brief of the Appellee, pages 15-17. The jury clearly found Appellant liable for a much less serious charge for some reason(s), and in fact the record is full of evidence tending to show that Williams was the initial aggressor. Although unnecessary to a resolution of the Brady issue before this Honorable Court, Appellant will, in brief response to the tendentiously truncated recitation of

trial testimony by the Appellee in its brief, clarify what the record also shows. The record reveals that Williams had tussled with Appellant's sister inside Appellant's own home, and that Williams grabbed Shanice Horne by the throat. (Testimony of Shanice Horne, TR-62; testimony of Imogene Paul, TR-73.). The record further shows that Williams told Appellant, "I'm shooting you, and if you don't hurry up and get over here by the time my Mom gets home, I'm going to shoot this bitch in the head." TR-76. There was ample evidence presented from which the jury could infer that Williams was of a violent predisposition, and apparently it did so infer to some extent.

Furthermore, John William Dassinger testified he purchased a "Glock-40" from Williams after the shooting (Second Supplemental Transcript-9, 10) and further that he had been trying to purchase it for some time when the alleged victim suddenly offered it to him for one hundred dollars (Second Supplemental Transcript-10). Investigating law enforcement officers Rex Tipton and Martin Spears testified that "the scene was photographed and evidence was

collected by [Agent Martin] Spears." Second Supplemental Transcript-1. The evidence which was collected consisted of a what appeared to the officer to be a .40 caliber bullet (Second Supplemental Transcript-5-6, 12), a spent .40 caliber shell casing (Second Supplemental Transcript-12), and photographs of the scene. (Second Supplemental Transcript-13). It is not an abstruse or farfetched theory that Williams was shot with his own gun, the same .40 caliber handgun he practically gave to Dassinger just after the incident, who had been begging him to buy it for a long time. Clearly this testimony strongly supports the Appellant's self-defense claim. Again, if it could have been shown that the bullet recovered from the scene matched the gun sold to Dassinger by Williams after the shooting, the Appellant would almost certainly been acquitted, a prediction further evidenced by the jury's conviction of Appellant of an offense closer in class to a misdemeanor than to the Class A offense for which he was tried.

That the theory of self defense or defense of another was seriously considered by the jury is

revealed by the letter from juror Andrew McCray, CR-63; this reference is being made for the sole purpose of solidly refuting the State's claim that there was no evidence of self-defense presented at trial.

But more importantly and obviously, the fact that the other evidence wasn't presented is because the State lost it; the state lost evidence which it gathered, processed, and had in its possession, and moreover lost it despite Appellant's pleas for its preservation. While Appellant fully concedes that the loss in this case appears to have been truly inadvertent, reality demands the recognition that, were this conviction to be affirmed, convenient "loss" of potentially exculpatory evidence, gathered by the State itself, could become a disturbingly frequent occurrence in other unscrupulous quarters. The holdings in the controlling cases cited by the parties act as a brake on this eminently conceivable scenario.

At any rate the Appellant is not required, under the authorities cited, to prove that the lost evidence would have with absolute certainty

exonerated him completely. In this case that can never possible, as the evidence is lost and therefore not available for ballistics or forensic examination. But it may well have, and is thus brought within the proper cruciality standard. The State thought the evidence was important enough to collect and process, and again, Appellant beseeched that it be preserved.

The fact that the State didn't use the items it lost in its case-in-chief, as Appellee argues at pages 16 and 17 of its brief, is totally without merit. How could it use them after it lost them? This fact, though, has nothing to do with due process considerations, predicated on the holdings in the cases cited by both Appellant and Appellee, that foreclose an adverse verdict in this case and demand a reversal of the Appellant's conviction where potentially exculpatory evidence is not made available to the defendant.

Aside from this reply, Appellant relies squarely upon the arguments advanced in his original brief.

2. Rule 26.6(b)(3)(ii), Alabama Rules of Criminal Procedure, states: "At a reasonable time prior to the [sentencing] hearing, the defendant shall be given notice of the prior conviction or convictions upon which the state intends to proceed."

No notice whatsoever was provided to the Appellant in this case, as is clearly revealed in the record and thoroughly explored by the Appellant in his original brief. Again, the cases cited by the Appellee in its brief only support remand of this case to the trial court for proper sentencing.

The State argues at page 18 of its brief that the trial court had sufficient basis from which to determine that notice requirements were satisfied. Appellant has twice implored the Trial Court to state what that basis is, and all requests have been denied. TR-142, CR-91.

The state argues that the holding in Cooper v. State, 632 So. 2d 1342 (Ala. Crim. App. 1993) permits service of a presentence report upon a defendant to substitute for notice as required under this statute.

This is flatly wrong, and at any rate no service of such a report was made in the instant case. Cooper actually holds,

"We do not believe that the presentence report contained in the record, which lists prior convictions, amounted to sufficient notice of the of the felony convictions that the state intended to prove at the sentencing hearing. While we are aware of our holding in Nesbitt v. State, 531 So.2d 37 (Ala.Cr.App.1987), that a defendant's receipt of a presentence report constitutes notice of the state's intent to proceed under the Habitual Felony Offender Act, we are not willing to extend that holding to allow the presentence report to supply sufficient notice of the specific prior convictions upon which the state intends to rely." Id at 1346.

Creation of a presentence report by one state department, which the department is under no duty to "provide" to a defendant, cannot through the most tortuous reasoning be construed as notice by the state of its intent to enhance on specific prior felonies. This is the common-sense result of the holding in Cooper.

The State also adopts the trial court's reasoning that, because Appellant has never denied

the felonies, this silence somehow suffices for prior notice as required by the statute. The fallacy of this reasoning is consummate. It was not proper for the notice of intent to enhance to be sprung upon the Appellant at sentencing hearing in the first place (TR-113), and doubly improper to seek to somehow use his counsel's objection, which is all the record shows, as some kind of implied, tacit admission. Had the Appellant been afforded prior notice of the State's intent to use specific felonies to enhance, as the law prescribes, then he would have been able to respond.

The cases cited by Appellee are either inapposite to the facts of the instant case, overruled by subsequent decisions, or support the Appellant.

In Williams v. State, 616 So. 2d 374 (Ala. Crim. App. 1993), cited by Appellee at page 20 of its brief, it appears this Court found some oral notice to have been provided. No oral notice was provided here, and the only "evidence" that there was such oral notice was provided by a representative of the State with

whom Appellant's counsel never discussed any prior felonies or entered into any cursory plea negotiations. (TR-113).

In R.J.S. v. State, 905 So. 2d 26 (Ala. Crim. App. 2004), cited by Appellee at page 20 if its brief, the defense attorney introduced documents which revealed his knowledge of the state's intent to use a specific foreign felony conviction. In this case, Appellant had no prior notice whatsoever of the specific felonies with which he was ambushed, as is clearly revealed in the record in this case. All the Appellant did was object at their surprise introduction. TR-112,113.

The citation by the State of Jones v. State, 625 So. 2d 1167 (Ala. Crim. App. 1993), cited by Appellee at page 20 if its brief, is unfathomable. In that case appellant's counsel testified regarding confidential attorney-client discussions at which prior felonies were discussed, which this Court found to imply notice. No such testimony was provided by the instant Appellant's trial counsel.

The facts and holding in the case of Hobson v. State, 625 So. 2d 1168 (Ala. Crim. App.), cited by Appellee at page 20 of its brief, are even more remote from those of the instant case. In that case this Honorable Court recited the facts as follows: "The record reflects that the State served the required notice on the appellant on June 17, 1992. The appellant argues that he did not receive the notice until June 19, 1992. The appellant was sentenced on June 22, 1992." Id at 1168.

In the instant case, as has been iterated and reiterated, notice was mailed on the day of sentencing, and was not received by Appellant until two days after sentencing, not two before.

Appellant does not dispute that cases may be interpreted to hold that oral notice, even informal notice, may suffice. In the instant case there was no notice whatsoever provided to the Appellant prior to sentencing. Testimony that there was oral notice came from a state's representative whom, it is undisputed, was never present when any "notice" was given, and with whom no prior felonies were ever discussed. The

State has never contended that Mr. Smith was ever at any of these "plea negotiations" of which he testified, nor has it disputed Appellant's assertion that he was most certainly not present. To the extent that the trial court relied on this misleading representation cited by Appellee at page 19 of its brief, in its decision, the decision is clearly due to be reversed. All of this is reflected and uncontradicted in the record.

Indeed, if the state met its notice requirement at "plea negotiations," why belatedly mail a written notice at all?

Appellee argues that "[Appellant] appears to concede that he, his attorney, the State's attorney, and the trial court were all aware of the felonies used to enhance his sentence. Brief of the Appellant, pp.38-43." Appellee's brief, page 19. Frankly Appellant is nonplussed by this bizarre remark, as nothing in his brief concedes anything of the kind.

Appellant repeatedly and earnestly implored the Trial Court to specify, as to time and form, the prior notice it found to have been provided. TR-142,

CR-91. These requests were denied. The Order (CR-50) was exhaustively discussed in Appellant's initial brief. Cooper unequivocally rejects as proper prior notice of intent a presentence report, which the Order mentions, and the general "awareness" found by the Trial Court and adopted by the State finds no support in any case law cited by either of the parties to this action. As stated earlier, to the extent this "awareness" was based on representations made by a representative of the State who was never present at any place where informal oral notice could have conceivably transpired, the Order is due to be reversed.

The Order of the Trial Court found that "the Defendant was aware that he had two prior felony convictions. This has never been disputed." CR-085. Again, Appellant was surprised by the introduction at the sentencing hearing. All he could do was object; when exactly was he supposed to dispute the allegations? Again, the first time Appellant or his counsel saw any document listing the certified felonies was upon receipt of the record on appeal in

this case. Requiring an on-the-spot admission or denial of the allegations is proscribed by the terms of the statute itself, which affords a defendant time to investigate and defend.

The Order goes on to state, "In this case, at the time of the Sentencing Hearing the State, the Defendant, and the Defendant's attorney, and the Court were aware that the Defendant had two prior felony convictions and this has never been disputed. Therefore, the Defendant was properly sentenced as an Habitual Offender." CR-085. Again, from where the trial court found this awareness to have originated was not disclosed, despite Appellant's pleas. Although awareness may settled into the consciousness of the Trial Court during the sentencing hearing after the state handed him a document listing claimed prior felonies (which document has never been provided to Appellant), there was certainly no such awareness upon the part of the Appellant, whose awareness is the singular concern under the statute. Nor does the record reflect any such "awareness."

As the record clearly and uncontrovertedly shows, no notice whatsoever of the State's intent to enhance under the HFOA was ever provided, in any form, at any time, prior to the sentencing hearing. The finding of notice by the Trial Court where none existed is a palpable abuse of the Trial Court's discretion.

CONCLUSION

By asking this Honorable Court to reverse its holdings in Gingo and Cooper, supra, the state implicitly admits that the conviction and the sentence from which Appellant appeals cannot be maintained under the terms of those holdings.

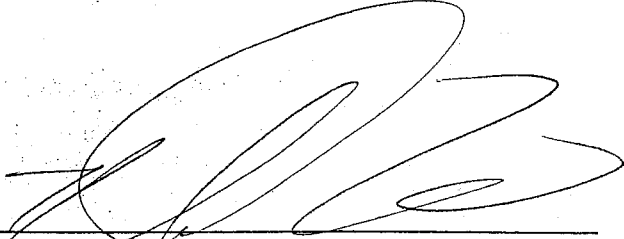
There are two ineluctable conclusions to be drawn from the record in this case: that the state lost potentially exculpatory evidence which it itself gathered and processed; and no prior notice whatsoever was provided to the Appellant of the State's intent to use prior convictions to enhance his sentence. The resolutions of the issues raised by these conclusions are governed by clear, unambiguous Alabama and federal law. The Trial Court's failure to dismiss was plain error, and finding proper HFOA notice where none whatsoever is disclosed in the record was an palpable abuse of the discretion afforded the court in Connolly v. State, 602 So. 2d 452 (Ala. 1992).

The Appellant, who is incarcerated, prays that this Honorable Court will merely apply the law as

dictated in the cases cited by Appellant and Appellee in their respective briefs, and, consequently, will reverse the conviction and render a judgment of acquittal (as the lost evidence is lost forever, making a new trial superfluous); while this would of course render resolution of the remaining notice issue academic, Appellant nevertheless and further prays that this Honorable Court will remand the case to the Trial Court for proper sentencing in the range prescribed by law for a single Class C felony conviction.

Respectfully submitted this the ____ day of

_____, 2005.

A large, stylized handwritten signature in black ink, appearing to read 'N. Tracy Nickson', is written over a horizontal line.

N. TRACY NICKSON (NIC026)
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DOCKET NUMBER: CR-04-2461

IN THE ALABAMA COURT OF CRIMINAL APPEALS

GARY HORNE,
APPELLANT,

v.

STATE OF ALABAMA,
APPELLEE.

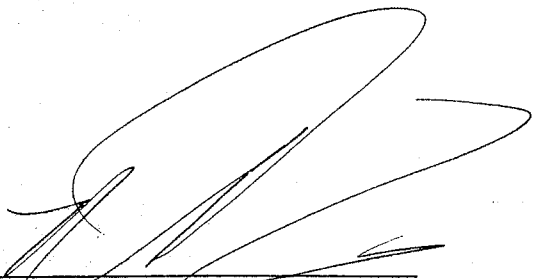
From the Circuit Court of Dale County, Alabama
Case No. CC-2004-1220

RELAY BRIEF OF THE APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon the following parties to the action by placing a copy in the U.S. Mail, first class, postage pre-paid on this ____ day of _____, 2005.

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Room 410
Montgomery, AL 36310



N. Tracy Nickson

EXHIBIT

E

Porter 85302

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala.R.App.P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

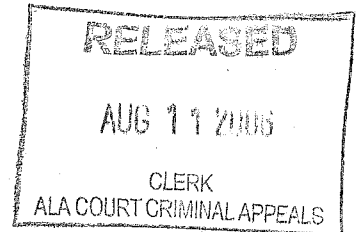
Court of Criminal Appeals

State of Alabama

Judicial Building, 300 Dexter Avenue

P. O. Box 301555

Montgomery, AL 36130-1555



H.W."BUCKY" McMILLAN
Presiding Judge
SUE BELL COBB
PAMELA W. BASCHAB
GREG SHAW
A. KELLI WISE
Judges

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MEMORANDUM

CR-04-2461

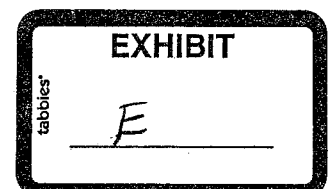
Dale Circuit Court CC-04-1220

Gary Horne v. State of Alabama

COBB, Judge.

Gary Horne was indicted by a Dale County grand jury for attempted murder, a violation of §§ 13A-6-2, -4-2, Ala. Code 1975. Horne was charged with shooting John Williams with a handgun. Horne was tried before a jury and the jury found Horne guilty of the lesser-included offense of assault, second degree. The trial court sentenced Horne as a habitual offender with two prior felonies to a 22-year term of imprisonment. The trial court further ordered Horne to pay restitution to the victim and to pay a \$100 assessment to the victims compensation fund. This appeal follows.

Horne does not challenge the sufficiency of the evidence,



so a summary of the evidence presented at trial will suffice. The evidence tended to show that, on January 15, 2004, John Williams went to Gary Horne's apartment to play video games, which they often did together. Horne's sister, Shanice, also came to the residence, along with Horne's girlfriend, Kesha Paul. Shanice and Williams had a child together, and Shanice brought their son so Williams could visit with him. The record suggests that, sometime before this incident, even though Williams and Shanice had ended their relationship and Williams had married Christina and had children with her, Williams and Shanice continued to have an intimate relationship. At some time during the evening, Shanice and Kesha borrowed Williams's cell phone and placed a call to Williams's wife, who came to the apartment and told Williams he needed to leave. When Williams began to leave Horne's apartment, Shanice hit him and the two began "tussling into the kitchen." (R. 12.) Horne intervened and began pushing Williams. Williams left the apartment.

Williams drove away in his vehicle and his wife, Christina, followed him in her vehicle; the Williams's baby was riding with her. He noticed that Shanice was following them in her own vehicle. Williams decided to go to his mother's residence because, he said, his mother "don't allow no foolishness at her house." (R. 14.) Williams said that, while he was driving, he telephoned Horne to tell him that he thought that Horne had not handled the situation well. Williams said that Horne threatened to hurt him, to which Williams replied that he could beat Horne in a fight. Horne asked where Williams was, and Williams told him he was at his mother's. Williams had parked his car in the parking lot of his mother's apartment complex and he noticed that Shanice had pulled her vehicle behind his and blocked his vehicle. Horne arrived a few minutes later.

After Horne arrived, Williams got out of his car and stood in front of Christina's car. Horne had a gun tucked in his pants, Williams said. Horne was "talking smack" and "mouthing off" to Williams for a minute or two, and Williams told Horne that he was acting tough now that Horne had a gun. Williams asked Horne what he wanted to do, and Horne pushed him. Williams acknowledged that he attempted to strike Horne in return, and Horne shot him in the side. Williams denied having a gun.

Shanice Horne and Christina Williams provided testimony about the shooting that substantially corroborated the testimony Williams gave. Shanice testified that she had been angry that Christina came to Horne's house, and then she was angry that Williams left without finishing the argument, so she followed him. Shanice said that she did not see Horne shoot Williams because she had left her car to walk across the street to call her mother.

Kesha Paul, Horne's girlfriend, testified for the defense. She stated that, after Williams left Horne's house, Williams called Horne, threatened to shoot Shanice, and told Horne he needed to come get his sister. She also said that Horne did not own a gun, but that Williams had a gun in his possession that night. Finally, John Dassinger, a friend of Horne's, testified that, in late January 2004, he bought a Glock .40 caliber pistol from Williams. That pistol was in the possession of the police department because officers seized it after Dassinger was arrested for possession of marijuana and a controlled substance as well possession of a pistol without a permit and possession of a pistol with altered serial numbers.

I.

Horne first argues that his conviction must be reversed because the State lost potentially exculpatory evidence. Specifically, he argues, the State lost a .40 caliber bullet and shell casing and crime scene photographs that he might have been able to use to support his self-defense claim.

Prior to trial, Horne filed a motion for discovery and a motion to compel production of exculpatory evidence. He later filed a motion to dismiss based on a violation of Brady v. Maryland, 373 U.S. 83 (1963), due to the loss of the bullet, shell casing, and photographs. Testimony at that hearing established that the shell casing was collected on the night of the shooting and photographs were taken at that time. Residents of the apartment complex contacted the police a day or two after the shooting and reported that they had found a bullet in the parking lot near where the shooting occurred. An officer retrieved the bullet, which he said appeared to be a .40 caliber. Testimony further established that, at the time of the shooting, the police had just moved into new offices and they transferred evidence to the new evidence room

under the supervision of an agent. The sole agent in charge of the evidence became too overwhelmed and could not keep track of the evidence, so the police department again began to maintain the evidence they had obtained. None of the officers who handled the evidence knew where it was located. Although the record does not contain a written order denying the motion to dismiss, the trial court obviously denied the motion as the case proceeded to trial. The State did not refer to any of the missing evidence in its case-in-chief. The parties agree that the police did not act in bad faith with regard to the lost evidence, and that the evidence was lost through negligence or inadvertence only.

Horne argues that the lost evidence was potentially exculpatory. He claims that the .40 caliber bullet might have matched the .40 caliber weapon that John Dassinger testified he purchased from the victim after the shooting, and that the testing might show that the victim was shot with his own gun and not a gun that Horne brought to the fight. He argues that the lack of bad faith in the loss of the evidence is immaterial because the evidence was crucial to his defense. Horne bases much of his argument on cases such as Brady v. Maryland, involving evidence that was suppressed -- whether intentionally or inadvertently -- by the police, but the State correctly notes that this case is governed by Arizona v. Youngblood, 488 U.S. 51 (1988), and its progeny, because the evidence here was lost before its exculpatory value could be determined and because the State did not rely on the lost evidence in its case-in-chief. We have previously recognized these important distinctions when reviewing cases in which evidence has been lost or destroyed. Holley v. State, 651 So. 2d 50 (Ala. Crim. App. 1994), presents the exact issue now before us. Writing for the majority, Judge Bowen stated:

"The appellant claims that he is entitled to a new trial because the State lost a hair sample that had been removed from his automobile during a search of that vehicle after he was arrested and after the vehicle was impounded. Citing Gurley v. State, 639 So. 2d 557 (Ala.Cr.App. 1993), he argues that the loss of the hair sample, which he says could have proved his innocence, rendered his trial fundamentally unfair.

"This case is different from Gurley and from Ex parte Gingo, 605 So. 2d 1237 (Ala. 1992), cert. denied, 506 U.S. 1049, 113 S.Ct. 967, 122 L.Ed.2d 123 (1993), upon which Gurley relied, because in this case the State did not use or allude to the hair sample in its case-in-chief. In Gurley, the State presented oral testimony about a charred object alleged to have been the victim's wallet, which had been lost by the time of trial, to establish the theft component of a capital indictment. In Gingo, the prosecution used the results from tests conducted on allegedly hazardous waste materials, which had been destroyed by the time of trial, to establish a crucial element of the State's case. Both Gurley and Gingo involved the State's use, at trial, of evidence that was unavailable for examination or testing by the defense.

"In this case, the hair sample was apparently lost before it could be subjected to forensic testing. It was not available to the defense, but it was also not available to or used by the State. The lost evidence in the appellant's trial is analogous to the missing evidence in Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

"In Youngblood, the police failed to preserve a sodomy victim's semen-stained clothing, but the State did not introduce any evidence pertaining to the clothing in its case-in-chief. The Supreme Court held that 'unless a criminal defendant can show bad faith on the part of the police, the failure to preserve potentially useful evidence does not constitute a denial of due process of law.' 488 U.S. at 58, 109 S.Ct. at 337. The appellant's case falls squarely within the rule of Youngblood.

"The appellant did not claim at trial and he does not claim on appeal that the State's loss of the hair sample was the result of bad faith. Therefore, the trial court did not err by failing to order an investigation into the disappearance of the

evidence. See Youngblood, supra. Furthermore, even if it had been determined that the hair sample did not match [the victim's] hair, that fact would not have precluded the appellant's guilt as [the victim's] kidnapper. The appellant was not entitled to a new trial on this ground."

651 So. 2d at 51-52.

This case is governed by the holdings in Youngblood v. Arizona and in Holley. Horne is not entitled to any relief due to the inadvertent loss of evidence which the prosecution did not use or allude to at trial.

II.

Horne next argues that the trial court abused its discretion when it sentenced him pursuant to the Habitual Felony Offender Act ("HFOA"), §13A-5-9, Ala. Code 1975, because the State failed to provide him with the requisite prior notice of its intent to proceed under that statute. Horne raised this claim below and the trial court rejected it, finding that Horne had been aware of the State's intent to seek sentencing under the HFOA and that the notice requirement had been satisfied.

The sentence hearing in this case was set for July 13, 2005, approximately two months after the jury found Horne guilty of second-degree assault. The State mailed defense counsel written notice of its intent to rely on the HFOA, but the record reflects that the notice was postmarked on July 13, 2005, so Horne obviously did not receive the written notice prior to sentencing. (3d Supp. R. 2, 6.) When the State offered certified copies of Horne's prior convictions at sentencing, Horne objected on grounds that he had not received any prior notice. The prosecutor stated that the written notice had been filed a day or two before sentencing¹, and also stated, "in the many discussions regarding a plea in this matter, it was known to the attorney in our discussions that Mr. Horne had two prior felonies. During the first day of trial we had discussions in which [defense counsel] was

¹The notification was filed on July 12, 2005. (C. 81.)

advised that the Defendant had two prior felonies" (R. 113.) Horne said he had not received any prior notice and, he said, "I still have not received any," (R. 113), apparently indicating that he was awaiting written notice. The trial court found that Horne had two prior felony convictions, one for hindering prosecution, first degree, and the other for robbery, second degree, and that he had been represented by counsel in both cases. Horne again objected based on the State's failure to notify him of its intent to rely on the HFOA provisions. The prosecutor stated that defense counsel:

"has known that he had these two prior felonies before the trial even started. As part of our plea discussions, he's well aware of the fact his client had prior convictions and that we intended to use them. If he wanted to investigate them, he's had adequate time to do so."

(R. 114.) The trial court determined that the State had met its obligation to give notice of its intent to rely on the HFOA and of the two convictions it would rely on.

After the trial court sentenced Horne pursuant to the provisions of the HFOA, Horne filed a motion to vacate the sentence. (C. 77-80.) He argued that he had not received written notice of the State's intent to proceed under the HFOA until after sentencing. In that motion, he argued for the first time that during plea negotiations, the State did not mention which prior convictions it would use to enhance his sentence. The trial court held a hearing on this motion and on a motion for new trial. Horne argued at that hearing that he did not receive written notice of the State's intent to proceed under the HFOA until after sentencing. He argued, "The law and the rule requires (sic) that prior written notice be given of the State's intention to enhance under the H.F.O.A., which this attorney did not get, nor did the Defendant get either." (R. 127.) (Emphasis added.)

The trial court denied the motion to vacate Horne's sentence. The court noted, first, that the probation report filed on July 8, 2005, listed Horne's two prior felonies for robbery and hindering prosecution. The court noted that, on July 12, 2005, the State filed notice of its intent to proceed under the HFOA. Finally, the court stated that it had

determined that Horne was aware that he had two prior felonies convictions and that that had "never been disputed." (C. 85.)

On appeal, Horne continues to argue that the State failed to notify him in writing prior to sentencing of its intent to rely on the HFOA or of the prior convictions it intended to prove. He also argues that he received no oral notice prior to the sentencing hearing.

The Alabama Supreme Court has stated:

"The HFOA requires enhanced punishment for repeat felony offenders. Ala. Code 1975, § 13A-5-9. See, e.g., McLester v. Smith, 802 F.2d 1330 (11th Cir.1986). For the HFOA to apply to a particular sentencing, the State must give reasonable notice, prior to the sentencing hearing, of the State's intention to proceed under the HFOA. Rule 26.6(b)(3), Ala.R.Crim.P. (formerly Temp. Rule 6(b)(3)(ii), Ala.R.Crim.P.). Written notice is not required; oral notice will suffice. Garrett v. State, 480 So. 2d 58 (Ala.Crim.App. 1985). Determination of the 'reasonableness' of the notice period is left to the trial judge's discretion, because the trial judge is present and is familiar with the circumstances of the case. Humber v. State, 481 So. 2d 452 (Ala.Crim.App. 1985)."

Connolly v. State, 602 So. 2d 452, 454 (Ala. 1992).

The State concedes that its written notice was mailed to defense counsel on the day of sentencing and could not have provided timely notice. (State's brief at p. 17.) To the extent Horne contends that the HFOA requires written notice, however, the law is clearly otherwise. E.g., Connolly, supra; Perry v. State, 861 So. 2d 1, 4 (Ala. Crim. App. 2002). The State argued at sentencing, and defense counsel did not dispute at that time, that during plea negotiations, the State informed Horne that it intended to invoke the HFOA and to prove the two prior felonies for robbery and hindering prosecution. Thus, the record supports the trial court's determination that Horne had received oral notice before trial of the State's intent to invoke the HFOA and of the two prior felonies it would attempt to prove. Therefore, as the trial court correctly determined at the sentencing hearing, the

State's oral notice was adequate. Horne is not entitled to any relief on this claim.

For the foregoing reasons, the judgment of the Circuit Court of Dale County is affirmed.

AFFIRMED.

McMillan, P.J., and Baschab, Shaw, and Wise, JJ., concur.

EXHIBIT

F

IN THE ALABAMA COURT OF CRIMINAL APPEALS

Gary Horne
Appellant,
vs.
State of Alabama
Appellee.

*

*

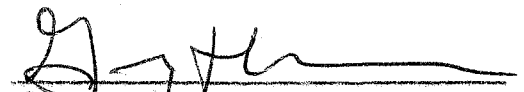
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Case No. CR-D4-2461

VERIFICATION OF MAILING

I hereby verify that on the 24th day of August, 2006, I have placed a copy of the above BRIEF and APPLICATION for REHEARING in the Institutional Mailbox, via U.S. Mail, postage pre paid and properly addressed to Tray King, Attorney General, 11 South Union St., Montgomery, AL 36130 and Lane Mann, Clerk, 300 Dexter Ave., Montgomery, AL 36104.

I verify that pursuant to Houston v. Lack, 487 U.S. 266, 101 L.Ed.2d 245, 108 S.Ct. 2379 (1988), Ex parte Powell, 674 So.2d 1258 (Ala. 1995) and Ex parte Wright, 860 So.2d 1253 (Ala. 2002), these three (3) witnesses saw me do so.

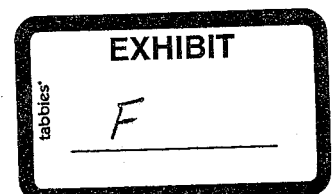

Gary Horne

WITNESSES:

Kenneth C. Powell
KENNETH C. POWELL #187215

Kenny Marshall
Henry Marshall, #137996

Elmore Nichols Jr.
Elmore Nichols, Jr.



CR-04-2461

IN THE ALABAMA COURT OF CRIMINAL APPEALS

Gary Horne
Appellant,

vs.

State of Alabama
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
DALE COUNTY, ALABAMA; CASE NO. CD04-1220

Rule 39(d)(5) Motion
AND
BRIEF IN SUPPORT
OF
APPLICATION FOR REHEARINGGary Horne # 180206
7A-62
Easterling Correctional Fac
200 Wallace Drive
Clid, Alabama 36017
Pro-se:

IN THE ALABAMA COURT OF CRIMINAL APPEALS

Gary Horne
Appellant,
vs.
State of Alabama
Appellee.

*

*

*

Case No. CR-04-2461

APPLICATION FOR REHEARING

Comes now the Appellant, Gary Horne, pro-se, and makes this Application to this Alabama Court of Criminal Appeals for a Rehearing of the issues, provided by Rule 40, Ala. R. App. P., and would support said Application with the brief affixed hereto.

RULE 39 (d)(5) MOTION

Pursuant to Rule 39 (d)(5), Ala. R. App. P., Appellant moves this Honorable Court to accept this statement of facts, in lieu of, the statement of facts encompassed in the opinion of the court, released on August 11, 2006, to wit:

The statement of the facts are the Appellant was convicted of the offense of assault in the second-degree, and acquitted of the offense of attempted murder. John Williams [hereinafter Williams] was shot on the evening in question.

Williams and the Appellant were good friends, and Williams had a son by the Appellant's sister. An eye witness saw Williams with a Glock .40 caliber pistol in his possession on the night of this incident. A confrontation ensued between Williams and the Appellant. The Appellant, in fear for his life believed that Williams would cause serious physical harm, or worse kill him, had he not fought back in self-defense.

During this brief struggle, Williams's pistol discharged, the .40 caliber bullet piercing through his body.

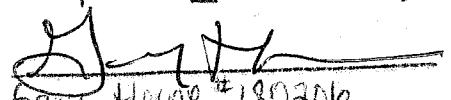
On or about January 2004, John Cassinger testified that he bought a Glock .40 caliber pistol from Williams.

During pre-trial, the appellant made several motions, one of them a motion to preserve evidence (i.e. exculpatory evidence). The Appellant avers that the prosecution lost the exculpatory evidence (i.e., a .40 caliber bullet, shell casing, and crime scene photographs) in which the appellant had vehemently tried to preserve in order that he may protect his substantial rights.

On or about July 13, 2005, the Appellant was sentenced to 22 years in the penitentiary. The Appellant was sentenced pursuant to H.F.D.A. § 13A-5-9, Code of Alabama 1975. The Appellant avers that the State of Alabama failed to notify him of its intent prior to his hearing. The State of Alabama conceded that its written notice was mailed to defense counsel on the day of sentencing and could not have provided timely notice. [See: State's Brief at p. 17.]

Date: August 24, 2006

Respectfully Submitted,



Gary Horne #180206

7A-62

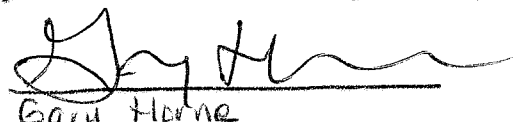
Easterling Correctional Facility

200 Wallace Drive

CLD, Alabama 36017

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2006, I have served a copy of the above and foregoing Application for Rehearing and Rule 39 (d)(5) Motion upon Troy King, Attorney 11 South Union St., Montgomery, Alabama 36130, via U.S. Mail, postage prepaid and properly addressed.


Gary Horne

STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Gary Horne, submits that he requests oral argument to assist court in evidentiary issues and appointment of counsel to conduct his oral argument due to the fact he is pro-se, and incarcerated within the Alabama Department of Corrections.

TABLE OF CONTENTS

	PAGES
APPLICATION FOR REHEARING	1.1
RULE 39(d)(5) MOTION	1.2
STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
STATEMENT OF THE ISSUES	2
STATEMENT OF THE STANDARD OF REVIEW	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5,6,7
CONCLUSION	8
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

CASES:

PAGES:

Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963)	4, 5
Giglio v. U.S., 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed. 2d 104 (1972)	6
U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985)	5

OTHERS:

ALABAMA RULES OF COURT:

Rule 26.6(b)(3)(ii), Ala. R. App. P.	7
Rule 40(b), Ala. R. App. P.	3
Rule 410(4), Ala. R. Evid.	7

UNITED STATES CONSTITUTION:

14th Amendment	5
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ALABAMA CONSTITUTION 1901:

Article I, § 6	5
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STATEMENT OF THE CASE

1. On or about May 18, 2005, the Appellant was convicted by a trial by Jury of Assault in the second-degree.
2. On or about June 20, 2005, the Appellant filed a Motion for New Trial, or In the Alternative for Judgment notwithstanding the Verdict.
3. On or about July 13, 2005, Appellant was sentenced to 22 years in the penitentiary.
4. On or about November 4, 2005, Appellant filed Brief for Direct Appeal.
5. On or about December 5, 2005, the Appellee filed the Appellee's Brief.
6. On or about December 9, 2005, Appellant filed Reply Brief.
7. On or about August 11, 2006, the Alabama ~~Supreme~~ Court of Criminal Appeals affirmed the decision of the trial court; released by "memorandum."
8. On or about August 24, 2006, the Appellant filed a Brief and an Application for Rehearing.

STATEMENT OF THE ISSUES

ISSUE I.

WHETHER THE CONVICTION OF THE APPELLANT MAY STAND WHERE THE STATE FAILED TO PRODUCE POTENTIALLY EXCULPATORY EVIDENCE GATHERED BY THE STATE?

ISSUE II.

WHETHER THE APPELLANT WAS ILLEGALLY SENTENCED THROUGH INVOLATION OF THE HABITUAL FELONY OFFENDER ACT?

STATEMENT OF THE STANDARD OF REVIEW

The standard of review on Application for Re-hearing is whether the Alabama Court of Criminal Appeals overlooked or misapprehended the facts in its review and determination on appeal.

[See: Rule 40(b), Ala. R. App. P.]

SUMMARY OF THE ARGUMENT

The Appellant is convinced that this court overlooked or misapprehended the unambiguous fact that the trial court allowed the State of Alabama to concede to losing material exculpatory evidence in direct violation of the due process clause of the 14th Amendment of the U.S. Constitution and landmark U.S. Supreme Court decision Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

The Appellant would further assert that this court overlooked or misapprehended the fact that the State failed to give notice of intent to use prior convictions against him, in contradiction with clear precedence set by the Alabama Supreme Court.

ARGUMENT

Issue I.

The Appellant's right to due process of the 14th Amendment of the U.S. Constitution and Article I, § 6 of the Alabama Constitution 1901 were violated when the prosecution, irrespective of good faith or bad faith, lost material evidence favorable to the Appellant which was relevant and material to either guilt or to punishment. [See: Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. ed. 2d 215 (1963).]

The record clearly reflects that the prosecution conceded to losing, which effectively suppressed, a .40 caliber bullet, shell casing and photographs, even though Appellant had filed a Motion to Preserve Evidence. Lack of this evidence prejudiced Appellant because had this evidence been available at trial, the outcome of Appellant's trial would have been different. [See: U.S. v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. ed. 2d 481 (1985).]

The Appellant was originally charged with attempted murder. Obviously, the jury didn't buy the State's contentions. The jury acquitted the Appellant of the attempted murder charge. The exculpatory evidence lost would have been favorable enough to sustain a plausible claim of self-defense, thus making the

difference between a conviction and an acquittal. [See: Giglio v. U.S., 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed. 2d 104 (1972).]

There are three components to a Brady violation. Moreover, there's no need to be repetitive with rote and rhetorical speech because this Honorable Court already knows the applicable law.

This is clear reversible error. It would be a fundamental miscarriage of justice to allow this ruling/judgment to stand without addressing the issues in dispute.

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony (or lack of) Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." [See: Brady, supra.]

It's been well established that the suppression (i.e., losing) by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, regardless of good or bad faith of prosecution. Upon the virtues of these facts, the Appellant would ask that this Court grant this Application for Rehearing.

ISSUE II.

The Appellant avers that he was not given prior notice of the State of Alabama's intent to enhance his sentence via H.F.D.A. The Appellant's sentencing hearing was July 13, 2005. The record reflects that the notice of intent was postmarked July 13, 2005, so it's obvious the Appellant did not receive the prior notice to sentencing. [See: 3d Supp. R. 2.6.]

The Appellant avers that Rule 26.6(b)(3)(ii), Ala. R. Crim. P. mandates that the defendant shall be given notice of the prior convictions, at a reasonable time prior to the hearing.

Furthermore, the prosecutor stated that defense counsel:

"has known that he had these two prior felonies before the trial even started. As part of our plea discussions, he's well aware of the fact his client had prior convictions and that we intended to use them. If he wanted to investigate them, he's had adequate time to do so."

From this, the trial court determined that the state had met its obligation to give notice of its intent to rely on the H.F.D.A. and of the two convictions it would rely on.

Rule 410(4), Ala. R. Evid., explicitly states:

"any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

The Appellant went to trial by jury. The State of Alabama is in violation of the Rules prescribed and promulgated by the Alabama Supreme Court.

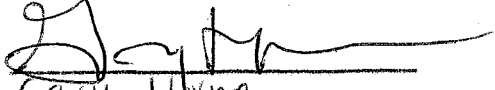
Both claims are meritorious. This Application for rehearing should be granted. In the alternative, this cause should be remanded with instructions for new sentencing.

CONCLUSION

The Appellant has brought forth cognizable claims supported with facts and evidence, which substantiates this Honorable Court overlooked or misapprehended the facts with an erroneous conclusion. This cause is due to be reversed and remanded with instructions that an evidentiary hearing be held with appointment of counsel.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2006, I have served a copy of the above and foregoing Brief, Rule 39 (d)(5) motion and Application for Rehearing upon Troy King, Attorney General, 11 South Union St., Montgomery, Alabama 36130, via U.S. Mail, postage prepaid and properly addressed.


Gary Horne

**COURT OF CRIMINAL APPEALS
STATE OF ALABAMA**

Lane W. Mann
Clerk
Gerri Robinson
Assistant Clerk



P. O. Box 301555
Montgomery, AL 36130-1555
(334) 242-4590
Fax (334) 242-4689

September 1, 2006

CR-04-2461

Gary Horne v. State of Alabama (Appeal from Dale Circuit Court: CC04-122)

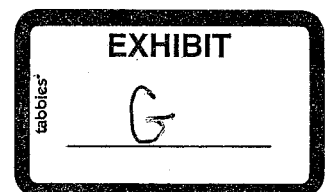
NOTICE

You are hereby notified that on September 1, 2006 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

**Lane W. Mann, Clerk
Court of Criminal Appeals**

cc: Hon. Mary Bludsworth, Circuit Clerk
N. Tracy Nickson, Attorney
Gary Horne, Pro Se
John M. Porter, Asst. Atty. Gen.



Gary Horne
Petitioner,
vs.
State of Alabama
Respondent.

*
*
*

Case No. CR-04-2461

85302
Piles

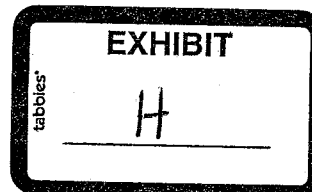
PETITION FOR WRIT OF CERTIORARI

Comes now the Petitioner, Gary Horne, pro-se, in the above styled cause of action; on appeal from the Circuit Court of Dale County to the Alabama Supreme Court; shows the following in support:

On or about August 11, 2006, petitioner's direct appeal was denied by the Circuit Court of Dale County, Alabama. On or about August 24, 2006, petitioner filed an Application for Rehearing and Rule 39(d)(5) motion to the Alabama Court of Criminal Appeals. On or about September 1, 2006, petitioner's Application for Rehearing was overruled.

The Court of Criminal Appeals in its published memorandum misapprehended the facts of petitioner's case. The petitioner's Issues are: (I) "whether the conviction of the Appellant may stand where the state failed to produce potentially exculpatory evidence gathered by the state?" and (II) "whether the Appellant was illegally sentenced through invocation of the H. F. O. A.?" [See: Record on File for Exhibits.]

WHEREFORE, for the above reasons, the petitioner prays that this court will issue this writ.
Date: September 11, 2006



Respectfully Submitted,
Gary Horne
74-180206

CERTIFICATE OF SERVICE

I hereby certify that Troy King, A.C. has been properly served, postage prepaid and properly addressed by U.S. Mail, at 11 South Union St. Montgomery, AL 36107.

02
Easterling Corr. Fac.
200 Wallace Dr.
Clid, AL 36017

IN THE SUPREME COURT OF ALABAMA

85302
Porter



October 13, 2006

1051770

Ex parte Gary Horne. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Gary Horne v. State of Alabama) (Dale Circuit Court: CC04-122; Criminal Appeals : CR-04-2461).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

WOODALL, J. - Nabers, C.J., and Lyons, Smith, and Parker, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 13th day of October, 2006

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

